Supreme Court, U.S.
FILED

99 841 OCT 12 1999

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

MICHAEL H. STEINHARDT,

Petitioner,

v.

UNITED STATES OF AMERICA
and REPUBLIC OF ITALY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

FREDERICK P. SCHAFFER
Counsel of Record
SCHULTE ROTH & ZABEL LLP
Attorneys for Petitioner
900 Third Avenue
New York, New York 10022
(212) 756-2000

Of Counsel:

MICHAEL S. FELDBERG
DENNIS C. O'DONNELL

155135

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming summary judgment to the United States on its claim for forfeiture of an antique gold platter (the "Phiale") under 18 U.S.C. § 545 on the ground that the designation of Switzerland as the country of origin on a customs entry form was a material false statement under a materiality standard that conflicts with the standard adopted by the Fifth and Ninth Circuits.

2. Whether the Court of Appeals erred in holding that forfeiture of the Phiale did not violate petitioner Michael H. Steinhardt's due process rights even though Steinhardt was an innocent owner who was not involved in or even had knowledge of any of the alleged wrongdoing.

3. Whether the Court of Appeals erred in holding that forfeiture of the Phiale was not punitive, and thus not subject to the Eighth Amendment's Excessive Fines Clause, in conflict with two prior decisions of this Court and decisions of the Third, Sixth, Ninth, and Eleventh Circuits.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Table of Appendices	viii
Opinions Below	1
Statement of Jurisdiction	1
Statutory and Constitutional Provisions Involved	1
Statement of the Case	1
A. Steinhardt and the Phiale	2
B. Haber's Importation of the Phiale	3
C. Proceedings Below	5
Reasons for Granting the Writ	8
I. The Second Circuit's Decision Conflicts With Decisions Of Several Other Circuits As To The Materiality Standard Applicable To Allegedly False Statements Made In Violation Of 18 U.S.C. § 542 And Raises An Important Issue Of Federal Statutory Construction.	8

Contents

Page

II. The Second Circuit's Holding That Forfeiture Of The Phiale Did Not Violate Steinhardt's Due Process Rights Even Though Steinhardt Was An Innocent Owner Raises A Substantial Constitutional Question. 14

III. The Second Circuit's Holding That Forfeiture Of The Phiale Was Not Subject To The Eighth Amendment's Excessive Fines Clause Conflicts With Decisions By This Court And Four Other Circuits And Raises An Important Constitutional Question. 18

Conclusion 25

TABLE OF CITED AUTHORITIES

Page

Cases:

Austin v. United States, 509 U.S. 602 (1993) 15, 18, 20, 21

Bennis v. Michigan, 516 U.S. 442 (1996) ..... *passim*

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) 15, 17

One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965) 22

One 1995 Toyota Pick-Up Truck v. District of Columbia, 718 A.2d 558 (D.C. Ct. App. 1998) 23

United States v. Bagnall, 907 F.2d 432 (3d Cir. 1990) 10

United States v. Bajakajian, 118 S. Ct. 2028 (1998) ..... *passim*

United States v. Corcuera-Valor, 910 F.2d 198 (5th Cir. 1990) 9, 10, 13

United States v. 817 N.E. 29th Drive, Wilton Manors, Florida, 175 F.3d 1304 (11th Cir. 1999), *petition for cert. filed* (Sept. 7, 1999) (No. 99-6374) 23

Cited Authorities

Page

United States v. Gallo, 599 F. Supp. 241 (W.D.N.Y. 1984) 11

United States v. Holmquist, 36 F.3d 154 (1st Cir. 1994), *cert. denied*, 514 U.S. 1084 (1995) 10, 11

United States v. Meldish, 722 F.2d 26 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984) 10

United States v. Murray, 621 F.2d 1163 (1st Cir. 1980), *cert. denied*, 449 U.S. 837 (1980) 10, 11

United States v. One Tintoretto Painting, Etc., 691 F.2d 603 (2d Cir. 1982) 15

United States v. Real Property Known and Numbered As 415 East Mitchell Avenue, 149 F.3d 472 (6th Cir. 1998) 23

United States v. Rose, 570 F.2d 1358 (9th Cir. 1978) 10

United States v. Sreamflo Strainer, Inc., 1996 U.S. Dist. LEXIS 21961 (W.D.N.Y. 1996) 11

United States v. Szwaczka, 769 F. Supp. 293 (E.D. Wis. 1991) 11

United States v. Teraoka, 669 F.2d 577 (9th Cir. 1982) 9, 10, 13

Cited Authorities

	Page
United States v. 3814 NW Thurman Street, Portland Oregon, 164 F.3d 1191 (9th Cir. 1999)	23
United States v. Ven-Fuel, Inc., 602 F.2d 747 (5th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980)	10
United States v. Ven-Fuel, Inc., 758 F.2d 741 (1st Cir. 1985)	10
Yskamp v. DEA, 163 F.3d 767 (3d Cir. 1998)	23
Statutes and Regulations:	
18 U.S.C. § 542	*passim*
18 U.S.C. § 545	*passim*
18 U.S.C. § 981(a)(1)(C)	6
18 U.S.C. § 982	19
18 U.S.C. § 2314	7
19 U.S.C. § 1595a(c)	6, 7
28 U.S.C. § 1254(1)	1
31 U.S.C. § 5316	19
19 C.F.R. § 24.23(b)(i)(B)	13

Cited Authorities

Page

Constitutional Provisions:

U.S. Const. amend V 1, 2, 6, 25

U.S. Const. amend VIII ..... *passim*

U.S. Const. amend XIV 15

Other Authority:

U.S. Sentencing Guidelines Manual § 2T3.1(a) (1995) 23

TABLE OF APPENDICES

Page

Appendix A — Order Of The United States Court Of Appeals For The Second Circuit Dated And Decided July 12, 1999 ..... 1a

Appendix B — Memorandum And Order Of The United States District Court For The Southern District Of New York Dated And Filed November 14, 1997 ..... 21a

Appendix C — Judgment Of The United States District Court For The Southern District Of New York Dated And Filed November 17, 1997 .... 50a

Appendix D — Relevant Statutes 52a

Appendix E — Fifth Amendment 55a

Appendix F — Eighth Amendment 56a

Steinhardt respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-20a) is reported at 184 F.3d 131 (2d Cir. 1999). The opinion of the District Court (App., *infra*, 21a-49a) is reported at 991 F. Supp. 222 (S.D.N.Y. 1997).

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on July 12, 1999, and, on September 7, 1999, granted a stay of the issuance of its mandate pending filing of this petition for certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the Customs Law, 18 U.S.C. §§ 542 and 545, the Fifth Amendment, and the Eighth Amendment are reproduced, *infra*, at App. D, E and F, respectively.

STATEMENT OF THE CASE

This case involves questions of critical importance to the proper construction of the nation's customs laws and how those laws are to be applied so as not to do violence to the protections afforded by the Fifth and Eighth Amendments. Petitioner Steinhardt purchased an antique gold libation cup,

known as a "phiale," through a New York art dealer, in 1991 for $1.2 million. The Government, at the request of the Republic of Italy, seized the Phiale in 1995 and thereafter filed a suit seeking forfeiture of the Phiale on the ground, *inter alia*, that a Customs entry form filed in connection with the Phiale's importation contained a material misstatement. The District Court granted summary judgment to the Government. The Second Circuit, acknowledging that its decision conflicted with decisions of the Fifth and Ninth Circuits and rejecting Fifth and Eighth Amendment defenses raised by Steinhardt, affirmed the forfeiture of the Phiale.

A. Steinhardt and the Phiale

In late 1991 Steinhardt was contacted by Robert Haber, a Manhattan art dealer. Steinhardt, a respected and successful investment fund manager, had begun collecting antiquities in 1987 or 1988. Steinhardt had known Haber since the late 1980's and believed Haber to be a reputable art dealer.

Haber informed Steinhardt about an antique gold platter he had seen recently. He described this Phiale, meaning "cup" in Greek, as a "third or fourth century Hellenistic object of Greek origin." He told Steinhardt that the Phiale was the "twin" of a phiale owned by the Metropolitan Museum of Art in New York City (the "Metropolitan Museum"), and that the seller of the Phiale was a Sicilian coin dealer.

After some period of consideration, including reviewing a published article about the "twin" in the Metropolitan Museum's collection, Steinhardt agreed to purchase the Phiale. The final terms of the agreement were incorporated into a telefax dated December 4, 1991, which provided that Steinhardt would pay 1.3 billion lire (more than $1 million),

plus a 15% commission, for a total purchase price of approximately $1.2 million. The telefax further provided that Steinhardt would pay the purchase price in two installments: the first was to be wired to Credit Suisse in New York for the account of Stedron, a Swiss art dealer, at Bank Leu in Zurich, Switzerland; the second (along with the commission) was to be sent after Steinhardt examined the Phiale and decided to acquire it. On December 6, 1991, in accordance with the terms of the Purchase Agreement, Steinhardt wired the first installment of the purchase price in favor of Stedron's account.

B. Haber's Importation of the Phiale

Steinhardt played no role in, and had no knowledge of, the actual importation of the Phiale, the details of which were all handled by Haber. After Steinhardt wired the first installment of the purchase price of the Phiale, on December 10, 1991, Haber traveled from New York to Zurich. Once there, he traveled to Lugano, Switzerland, where he took possession of the Phiale from William Veres, an art dealer and owner of the Stedron art dealership in Zurich, Switzerland.

According to the government, Veres had first brought the Phiale to Haber's attention, and Veres and Haber had traveled to Sicily to see the Phiale in November 1991. The Phiale was then, again according to the government, in the possession of Vincenzo Cammarata, an Italian coin and art dealer who claimed to have purchased it from Vincenzo Pappalardo, another Italian art collector living in Sicily. Veres is alleged to have purchased the Phiale from Cammarata in exchange for works of art worth approximately $90,000.

About the time he took possession of the Phiale, Haber received from Veres a document entitled "Terms of Sale," which provided, unbeknownst to Steinhardt, that "[i]f the object is confiscated or impounded by customs agents or a claim is made by any country or government agency whatsoever, full compensation will be made immediately to the purchaser."

On December 13, 1991, Haber sent a two-page fax to his Customs Broker, Jet Air Service, Inc. ("Jet Air"). In the fax, Haber included information concerning his return trip to the United States, as well as a commercial invoice dated December 12, 1991. The invoice, made out on Stedron letterhead, described the object as "One Gold Bowl — Classical" and reflected that the object was consigned to Haber. The invoice also stated that the Phiale had a value of $250,000 even though Steinhardt had conditionally agreed to pay more than $1 million for it. On or about December 14, 1991, Haber left Lugano and returned to Zurich, and on December 15, 1991, he flew from Geneva to J.F.K. Airport. Haber carried the Phiale with him.

Jet Air had already drafted two Customs entry forms for the Phiale. Both forms requested identification of "country of origin," even though the Phiale could have been brought into the country by means of other Customs forms that did not require any such designation. Jet Air listed the country of origin on both forms as "CH," the Customs Service's designation for Switzerland, because of (a) the Swiss letterhead on the invoice Haber had faxed to Jet Air and (b) default settings in Jet Air's computer software that, unless otherwise indicated, listed the exporting country (here Switzerland) as the country of origin. Jet Air also listed the Phiale as having a value of $250,000. Jet Air submitted one

of the forms, along with the invoice Haber had faxed, to the Customs Service prior to Haber's arrival in the country. Upon review of that form and the invoice, the Customs Service directed that its import specialist team for antiquities review the Phiale.

When Haber arrived, the import specialist team for antiquities conducted an examination of the Phiale. Although aware from the invoice that it was an item of classical antiquity exported from Switzerland, the government allowed Haber to import the Phiale into the United States.

Haber thereafter delivered the Phiale to Steinhardt, who, concerned as to whether the Phiale was an authentic antique or a fake, had it consigned to the Metropolitan Museum for review as to its authenticity. After the Museum's experts considered the Phiale and opined that it was as authentic as the one in the Museum's collection, on January 29, 1992, Steinhardt wired the second half of the purchase price to the Stedron account. Steinhardt completed the transaction by wiring Haber's commission of $162,364 to the Stedron account on March 11, 1992.

After the Metropolitan Museum returned the Phiale to him, Steinhardt displayed it in his home. It remained there until November 9, 1995, when the Customs Service seized it.

C. Proceedings Below

The Customs Service seized the Phiale little more than a month after the United States Attorney for the Southern District of New York, acting pursuant to Letters Rogatory from the Republic of Italy, issued a commissioner's subpoena

to Steinhardt seeking information concerning the Phiale. Steinhardt was, through counsel, in the process of working out the details of subpoena compliance when Customs agents raided Steinhardt's home and seized the Phiale. The government has retained it since that time.

On December 13, 1995, the government filed the instant civil forfeiture action. The Verified Complaint alleged that the government could forfeit the Phiale pursuant to 18 U.S.C. §§ 545, 981(a)(1)(C) and 19 U.S.C. § 1595a(c) because a false statement concerning country of origin was made on the Customs entry form in violation of 18 U.S.C. § 542.

On December 21, 1995, Steinhardt filed a Verified Statement of Claim to the Phiale and also moved for summary judgment. On January 31, 1996, the Republic of Italy, through New York counsel, also filed a Verified Statement of Claim.

Discovery ensued in which Steinhardt cooperated without qualification. Steinhardt testified fully at a deposition, and produced all of the relevant documents he had, whereas Haber took the Fifth Amendment and a representative of the Republic of Italy refused to answer any substantive questions at their respective depositions. The government never contended, and there was no evidence to demonstrate, that Steinhardt had anything to do with the importation of the Phiale into the United States or had any knowledge of the country of origin information on the Customs entry forms.

In its First Amended Complaint filed February 13, 1996, the government added a second ground for forfeiture based on an allegation that an unidentified confidential informant

claimed the Phiale "was discovered during the period 1984-92 in the course of excavations for the installation of electric light poles in a state-protected archaeological area in Caltavuturo, Palermo." According to the government, the Phiale was "stolen" because (a) Italy's cultural property laws vest ownership in the Italian State of cultural objects found in the course of excavations and/or (b) under Italian law *all* archaeological items are presumed to belong to the Italian State unless the holder can demonstrate private ownership prior to 1902. Thus, the government alleged, the Phiale could be forfeited because its importation into the United States violated the National Stolen Property Act, 18 U.S.C. § 2314.

In an Opinion and Order dated November 14, 1997, the District Court granted the government's motion for summary judgment on its claims for forfeiture pursuant to 18 U.S.C. § 545 and 19 U.S.C. § 1595a(c). (App. 48a.) Judgment was entered on November 17, 1997, granting the government the right to forfeit the Phiale on both of the alternative bases for forfeiture it had advanced: that the Phiale had been imported contrary to law because of false statements in the Customs entry forms as to country of origin and because the Phiale was "stolen" property.

Steinhardt appealed, briefing ensued that included the filing of *amicus curiae* briefs on behalf of a number of museums and professional organizations, and the appeal was argued on October 14, 1998. On July 12, 1999, the United States Court of Appeals for the Second Circuit affirmed the District Court's Opinion and Order on the first of the government's arguments (*i.e.*, a false statement on the Customs entry form), and consequently found no need to reach the government's other argument (*i.e.*, that the Phiale was "stolen" property). (App. 2a-3a.) In so holding, the Court

of Appeals, while acknowledging that "the circuits are divided as to the proper test," adopted as controlling a materiality standard that simply "ask[ed] whether the false statement would have a natural tendency to influence customs officials." (App. 9a.) The Second Circuit also rejected Steinhardt's argument that the Due Process Clause entitled him to an innocent owner defense under Section 545, and held that the forfeiture of the Phiale was "nonpunitive and outside the scope of [the Eighth Amendment's] Excessive Fines Clause." (App. 20a.)

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF SEVERAL OTHER CIRCUITS AS TO THE MATERIALITY STANDARD APPLICABLE TO ALLEGEDLY FALSE STATEMENTS MADE IN VIOLATION OF 18 U.S.C. § 542 AND RAISES AN IMPORTANT ISSUE OF FEDERAL STATUTORY CONSTRUCTION.

In affirming summary judgment to the United States on its claim for forfeiture of the Phiale under 18 U.S.C. § 545 on the ground that the Customs forms filed for the Phiale contained a material false statement in violation of 18 U.S.C. § 542, the Court of Appeals adopted a materiality standard that, by the Court's own admission, is in conflict with the standard adopted by at least two other circuits. The Second Circuit held that the statutory requirement that the challenged importation be "by means of" a false statement can be satisfied by showing simply that "the false statement would have a natural tendency to influence customs officials." (App. 9a.) The Court of Appeals itself conceded that "[t]he

circuits are divided as to the proper test," with the Fifth and the Ninth Circuits adopting the "but for" standard advanced by Steinhardt, and the First and (arguably) the Third embracing the "natural tendency" standard adopted by the Second Circuit. (App. 9a.) Under the test adopted by the Fifth and the Ninth Circuits, the "by means of" language can only be satisfied by showing that the false statement was the "but for" cause of the importation, *i.e.*, that if not for the false statement on the relevant Customs form the item would have been prevented from entering the United States. Given this split in the circuits — and the fact that the correct materiality standard raises an important issue of federal statutory construction — the Court should find that more than sufficient grounds exist for granting certiorari on this issue.

Moreover, the Second Circuit's adoption of the "natural tendency" standard conflicts directly with the better-reasoned views of the Fifth and Ninth Circuits on this issue. Although Section 542 does not expressly set out a materiality standard, the Fifth and the Ninth Circuits have held that both the language in the statute requiring that the allegedly illegal importation be effectuated "by means of" of a false statement and the statute's overall purpose suggest that a "but for" test is the more appropriate standard. *See United States v. Corcuera-Valor*, 910 F.2d 198 (5th Cir. 1990); *United States v. Teraoka*, 669 F.2d 577 (9th Cir. 1982).

In *Corcuera-Valor*, the Fifth Circuit held that under Section 542, the government must demonstrate "that but for the false statement the merchandise would not have been allowed to cross United States borders." 910 F.2d at 199 (citation omitted). The court there threw out a conviction under Section 542 because, though there was no question

that the defendants had presented false invoices upon the importation of certain goods, the government did not present any evidence that the goods were allowed into the country because of the false invoices. *Id.* at 200; *see also United States v. Ven-Fuel, Inc.*, 602 F.2d 747, 753 (5th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980) (misrepresentation in application for license to import fuel was not material under Section 542 in the absence of "a logical nexus between the [misrepresentation] and the actual importation of fuel.").

In *Teraoka*, the Ninth Circuit held that "[u]nder the clear language of Section 542, the false statement must have significance not to any aspect of the importation process, but rather to the *actual admission* of the goods in question." 669 F.2d at 579 n.3 (emphasis supplied). In *Teraoka*, the defendant importer was charged with violating Section 542 by filing false invoices that overstated the value of the goods it was importing in order to avoid a duty that would be imposed under an anti-dumping statute. The court held that because the effect of the filing of a truthful invoice would have been merely the imposition of a tax on the goods, not a bar on their importation, the defendant had not brought the goods into the country "by means of" a false statement. *Id.* at 579; *see also United States v. Meldish*, 722 F.2d 26 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984); *United States v. Rose*, 570 F.2d 1358 (9th Cir. 1978).

In contrast, the First Circuit has held that "a false statement is material under section 542 if it has the potential significantly to affect the integrity or operation of the importation process as a whole." *United States v. Holmquist*, 36 F.3d 154, 158 (1st Cir. 1994), *cert. denied*, 514 U.S. 1084 (1995); *see also United States v. Bagnall*, 907 F.2d 432, 435 (3d Cir. 1990) (dictum); *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 762 (1st Cir. 1985); *United States v. Murray*, 621

F.2d 1163 (1st Cir. 1980), *cert. denied*, 449 U.S. 837 (1980). Such a standard, however, vitiates the "by means of" language of Section 542, which, as a matter of plain meaning, clearly supports the conclusion that the government must demonstrate that the false statement actually caused the importation of the goods into the country, not that the false statement had a "natural tendency to influence the actions of the Customs Service."[1]

The circuit split on this issue, which has been broadened by the Second Circuit's decision in this case, reflects a corresponding split at the district court level. *See, e.g., United States v. Sreamflo Strainer, Inc.*, 1996 U.S. Dist. LEXIS 21961 (W.D.N.Y. 1996); *United States v. Gallo*, 599 F. Supp. 241 (W.D.N.Y. 1984) (following *Corcuera-Valor*); *United States v. Szwaczka*, 769 F. Supp. 293 (E.D. Wis. 1991) (following *Holmquist*). Left uncorrected, the Second Circuit's decision, and its conflict with the Fifth and Ninth Circuits, promises to give rise to Section 542 prosecutions that will spawn further inconsistent decisions on this issue. This case provides an opportunity for this Court to furnish much needed guidance to the lower federal courts on this important question, and thus to restore predictability and uniformity to the law.

Review of the Second Circuit's decision is also warranted because the Court of Appeals' adoption of the "natural tendency" standard for materiality under Section 542 raises an important issue of federal statutory

1. The Second Circuit citation to various false statement statutes for which the courts have adopted a "tendency to influence" test for materiality (App. 10a) is therefore inapposite. None of those statutes include the "by means of" language present in Section 542 and there is no evidence of a legislative intent to incorporate these other standards into Section 542.

construction. Given the current state of the law, ongoing enforcement of the statute, as presently construed, is likely to both lead to unfair results and to prove more burdensome for the Customs Service and the Justice Department than should be the case.

The unfair results likely to flow from the Second Circuit's adoption of the "natural tendency" standard are well illustrated by this case. Invoking this broad-based standard, the Second Circuit upheld the forfeiture of a $1.2 million artifact on the basis of allegedly false statements about the artifact's country of origin made by someone other than the artifact's owner under circumstances where the government had no other statutory basis for its seizure of the Phiale and no statement about the artifact's country of origin even needed to be made. Indeed, it was undisputed that no trade restriction, embargo, tariff or other import regulation applied to an antique object, such as the Phiale, made in Italy and imported from Switzerland. The government's sole ground for seizing the Phiale was the contention that it was "stolen" property within the meaning of the National Stolen Property Act, a claim that Steinhardt showed to be without merit below and the Second Circuit declined to reach. In the absence of any demonstrated basis for seizure of the Phiale, the country of origin designation could not have been material because no matter what country was designated, the government would not have had the power to seize and forfeit the Phiale. Moreover, as Steinhardt also pointed out below, and the government did not contest, *the Phiale could have been brought into the United States without the filing of any form asking for its country of origin.*[2] Such circumstances

2. Although the Second Circuit observed in passing (App. 5a) that the Customs entry declaration also misstated the value ($250,000 (Cont'd)

notwithstanding, under the standard adopted by the Second Circuit, the voluntary provision of non-material information resulted here — and could result in many similar cases — in the forfeiture of items that could otherwise have been legally imported into the United States.

The coexistence of the "but for" and "natural tendency" standards for materiality under Section 542 is also certain to make administration of that provision by the Customs Service and the Justice Department more difficult. In those districts where the Second Circuit standard is followed, any customs declaration will be deemed "materially false" so long as it has a "natural tendency" to influence the actions of the Customs Service, a circumstance certain to generate extensive Section 542 prosecutions. In other districts, by contrast, where the *Corcuera-Valor/Teraoka* standard is adopted, a much higher showing of materiality will be required, yielding substantially fewer prosecutions.

Under such circumstances, no one set of regulations or guidelines would suffice for proper administration and enforcement of the statute, thereby imposing an unnecessary administrative burden on Customs Service officials. Different ports of entry could have different practices and standards as to completion of Customs entry forms. Importers, whether

---

(Cont'd)
instead of $1.2 million) of the Phiale, neither the government's case nor the District Court's holding was predicated on this alleged misstatement. In any event, any alleged misstatement of the Phiale's value could not have been material because, as also argued by Steinhardt below, this number was used solely to compute the $400 processing fee charged for importation of the Phiale, which was the maximum fee provided by law. 19 C.F.R. § 24.23(b)(i)(B). It would have made no difference if the Phiale had been valued at a figure greater than $250,000.

they had anything to hide or not, might seek to channel all of their imports through ports of entry with less demanding requirements (such as in the Fifth and Ninth Circuits), thus overwhelming Customs facilities at those ports and making appropriate scrutiny of imports more difficult — all to the ultimate detriment of nationwide Customs Service enforcement efforts. Only a uniform standard as to materiality under Section 542 can obviate the possibility of this outcome.

For all the foregoing reasons, guidance as to the proper materiality standard for Section 542 is plainly required, and this case provides an opportunity for this Court to speak comprehensively to this important issue.

II. THE SECOND CIRCUIT'S HOLDING THAT FORFEITURE OF THE PHIALE DID NOT VIOLATE STEINHARDT'S DUE PROCESS RIGHTS EVEN THOUGH STEINHARDT WAS AN INNOCENT OWNER RAISES A SUBSTANTIAL CONSTITUTIONAL QUESTION.

Steinhardt's petition for a writ of certiorari should be granted because the Second Circuit's decision also conflicts with decisions of this Court relating to the due process protections applicable to forfeiture statutes. In holding that forfeiture of the Phiale did not violate Steinhardt's due process rights even though Steinhardt was an innocent owner who was not involved in and lacked knowledge of any of the alleged wrongdoing, the Second Circuit read this Court's relevant precedent as precluding entirely due process challenges by innocent owners to forfeiture statutes. So broad a reading of this Court's prior holdings in this area overstates the more narrow scope of these holdings, and should be

corrected by this Court before more harm can be engendered by the unrestrained use of Section 545 and similar forfeiture provisions.

Although *in rem* forfeiture has traditionally been understood to rest on the legal fiction of the "guilt" of the *res*, this Court has recognized that "forfeiture generally and statutory *in rem* forfeiture in particular historically have been understood, at least in part, as punishment." *Austin v. United States*, 509 U.S. 602 (1993). This understanding prompted the Court in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), to note that "it would be difficult to reject the constitutional claim of . . . an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property." *Id.* at 689; *see also United States v. One Tintoretto Painting, Etc.*, 691 F.2d 603, 607 (2d Cir. 1982).

The Second Circuit held that the due process limitations on forfeiture of property from innocent owners are inapplicable here because of this Court's decision in *Bennis v. Michigan*, 516 U.S. 442 (1996). (App. 17a.) In *Bennis*, this Court held that it was not a violation of the Due Process Clause of the Fourteenth Amendment for Michigan courts to order forfeiture of a wife's interest in a jointly-owned automobile worth less than $600 in which her husband had committed a sexual act with a prostitute. *Id.* at 443-45. The car was forfeited under a Michigan statute that allowed for abatement of public nuisances; the car was found to be a public nuisance because it had been used for an illegal purpose. *Id.* at 444. The Court's opinion, joined by four of the five Justices in the majority, held that even though Ms. Bennis lacked knowledge of her husband's wrongdoing,

forfeiture of the car did not violate due process under case law upholding civil forfeiture for remedial and deterrent purposes. *Id.* at 453.

Justice Ginsburg, however, who cast the deciding vote, filed a separate concurrence to "highlight features of the case key to my judgment." *Id.* at 457. *First*, she noted "it bears emphasis that the car in question belonged to John Bennis as much as it did to Tina Bennis," and that "he had her consent to use the car." *Id.* Thus, "[t]he sole question, then, is whether Tina Bennis is entitled not to the car, but to a portion of the proceeds . . . as a matter of constitutional right." *Id.*

Second, Justice Ginsburg stressed that the Michigan statute under which the car was forfeited was an equitable statute, under which the trial court had discretion to mitigate the forfeiture. *Id.* (citation omitted). That the forfeiture action was one in which the courts retained equitable jurisdiction to mitigate an unduly harsh forfeiture "means the State's Supreme Court stands ready to police exorbitant applications of the statute." *Id.* Given the equitable discretion afforded to the trial court under the Michigan statute, Justice Ginsburg concluded that "Michigan, in short, has not embarked on an experiment to punish innocent third parties. . . . Nor do we condone any such experiment." *Id.* at 458.[3]

---

3. Even the majority opinion found "considerable appeal" in Ms. Bennis' argument that "the Michigan forfeiture statute is unfair because it relieves prosecutors from the burden of separating co-owners who are complicit in the wrongful use of property from innocent co-owners," but added that "[i]ts force is reduced in this case . . . by the Michigan Supreme Court's confirmation of the trial court's remedial discretion." *Id.* at 453.

These "key factors" that informed Justice Ginsburg's decision to side with the *Bennis* majority are simply not present here. Unlike in *Bennis*, the alleged wrongdoer here (Haber) had no property interest in the Phiale; the full effect of this forfeiture will fall solely on Steinhardt, who is not alleged to have committed any wrongdoing. Furthermore, unlike the forfeiture statute at issue in *Bennis*, the forfeiture statutes on which the government relies here do not afford courts equitable discretion to mitigate the forfeiture. In Justice Ginsburg's phrase, the Court is powerless under Section 545 to "police exorbitant applications of the statute[s]." *Id.* at 458.

Prior to *Bennis* this Court "consistently recognized an exception [to forfeiture] for truly blameless individuals. The Court's opinion in *Calero-Toledo* . . . established the proposition that the Constitution bars the punitive forfeiture of property when its owner alleges and proves that he took all reasonable steps to prevent its alleged use." *Bennis*, 516 U.S. at 466-67 (Stevens, J. dissenting). Measured by this standard, forfeiture of the Phiale would clearly violate Steinhardt's due process rights.

There is no evidence that Steinhardt knew of the alleged misstatement on the Customs forms or was aware of the document referred to as the "Terms of Sale" entered into between Haber and Stedron. To the contrary, Steinhardt acted as a "truly blameless individual" when he submitted the Phiale to the Metropolitan Museum for an examination by the Museum's experts. *Id.*

Under such circumstances, the forfeiture of the Phiale should have been held to violate Steinhardt's due process rights. The Second Circuit's failure to do so, and its

misplaced reliance on this Court's *Bennis* holding for this result, warrants review by this Court. Steinhardt's petition for writ of certiorari should be granted so that the Court may affirm the importance of its long-standing holdings on due process in the forfeiture context, as well as make clear that *Bennis*, properly construed, does not preclude due process challenges to all forfeiture statutes.

III. THE SECOND CIRCUIT'S HOLDING THAT FORFEITURE OF THE PHIALE WAS NOT SUBJECT TO THE EIGHTH AMENDMENT'S EXCESSIVE FINES CLAUSE CONFLICTS WITH DECISIONS BY THIS COURT AND FOUR OTHER CIRCUITS AND RAISES AN IMPORTANT CONSTITUTIONAL QUESTION.

Steinhardt's petition for writ of certiorari should also be granted because the Second Circuit's conclusion that forfeiture of the Phiale was not subject to the Eighth Amendment's Excessive Fines Clause conflicts, in both reasoning and result, with decisions by this Court and four other Circuits on the same issue, and raises an important constitutional question.

More specifically, in holding that forfeiture of the Phiale was not punitive, and thus not subject to the Eighth Amendment's Excessive Fines Clause, the Second Circuit reached a conclusion that conflicts directly with (a) this Court's holding in *United States v. Bajakajian,* 118 S. Ct. 2028, 2034 (1998), that a forfeiture of property where the only injury to the government is a loss of information is necessarily punitive; and (b) this Court's holding in *Austin v. United States*, 509 U.S. 602 (1993), that the Excessive Fines Clause applies to both civil *in rem* and criminal

forfeitures, insofar as both serve to punish rather than remedy a loss to the government. In addition to raising a substantial issue relating to this Court's understanding of the protections afforded by the Eighth Amendment, the Second Circuit decision also conflicts with post-*Bajakajian* decisions by the Third, Sixth, Ninth, and Eleventh Circuits, as well as the highest court of the District of Columbia, all of which applied a *Bajakajian* Excessive Fines Clause analysis to civil *in rem* forfeitures.

The Court's recent decision in *Bajakajian* made clear that where the government seeks to forfeit property solely on the basis of a failure to report information — so that the only loss to the government is a loss of information — the forfeiture is punitive and therefore subject to the Eighth Amendment's bar on excessive fines. Bajakajian was arrested and charged in connection with false statements he made to Customs officials while departing from the country. He represented that he and his wife were traveling with $8,000 and $7,000 in currency respectively, but upon inspection they were found to have over $357,000 in currency in their possession. 118 S. Ct. at 2032. Bajakajian pleaded guilty to violating 31 U.S.C. § 5316 by failing to report that he was transporting more than $10,000 in currency outside of the United States. The government sought forfeiture of all of the unreported funds under 18 U.S.C. § 982. The District Court, however, found that the forfeiture was disproportional to Bajakajian's offense, and mitigated the forfeiture to $15,000. The Court of Appeals for the Ninth Circuit affirmed, and the government appealed, seeking forfeiture of the full amount of the currency.

This Court first held that the Excessive Fines Clause of the Eighth Amendment applied to the forfeiture, following

Austin v. United States, 509 U.S. 602 (1993), where it held that a forfeiture that serves at least in part to punish the property owner — as opposed to merely remedying a loss to the government — constitutes a "fine" and is therefore subject to the Eighth Amendment's prohibition on excessive fines. *Bajakajian* held that the proposed forfeiture of all of the unreported funds would constitute punishment, and therefore was subject to the Excessive Fines Clause of the Eighth Amendment. 118 S. Ct. 2036. In reaching this conclusion, the Court noted that the only loss to the government was a loss of information, namely the true amount of currency Bajakajian intended to take out of the country; Bajakajian otherwise lawfully possessed the money. The Court therefore rejected the government's argument that forfeiture of the unreported funds served a remedial purpose, because the loss of information to the government could not be remedied by the forfeiture of the unreported funds. *Id.* at 2034. In a similar vein, the Court rejected the government's argument that the unreported funds constituted the instrumentality of Bajakajian's crime, concluding that the unreported funds were "merely the subject of the crime of failure to report" but did not "facilitate the commission of that crime . . ." *Id.* at 2036 n.9.

Bajakajian went on to hold that forfeiture of the unreported funds would be constitutionally excessive. Acknowledging that it had never previously articulated a standard for determining whether a forfeiture is excessive under the Eighth Amendment, the Court held that "a punitive forfeiture violates the Eighth Amendment if it is grossly disproportional to the gravity of the defendant's offense." 118 S. Ct. at 2036. The Court concluded that the forfeiture of the unreported funds would be grossly disproportional to Bajakajian's offense, given that his only crime was the failure

to report currency in his possession and that the maximum penalty that could be imposed was six months imprisonment and a $5,000 fine. *Id.* at 2038.

The Second Circuit's conclusion that the government could forfeit the Phiale solely on the basis of the alleged false statement on the Customs entry form makes the Steinhardt forfeiture identical to the *Bajakajian* forfeiture in that the only loss the government would have suffered was the loss of information — namely the country of origin of the Phiale. The Second Circuit distinguished *Bajakajian* on the ground that it involved a criminal forfeiture, whereas this case involved an *in rem* forfeiture. (App. 18a-19a.) That purported distinction ignores the Court's holding in *Austin* that the Eighth Amendment applies even to a civil *in rem* forfeiture, so long as the forfeiture serves at least in part to punish the property owner. 509 U.S. at 610. Indeed, *Austin* held that the Eighth Amendment applied to the civil forfeiture at issue in that case. 509 U.S. at 621-22. Moreover, although *Bajakajian* involved a criminal forfeiture, this Court there reiterated that the Eighth Amendment applies to civil forfeitures that are punitive. *Bajakajian*, 118 S. Ct. at 2034 n.4.

The Second Circuit also justified its holding on the ground that the Phiale was "classic contraband," insofar as it was "an item imported into the United States in violation of the law." (App. 19a.) That reasoning has no legal support. The Second Circuit declined to reach the question of whether Italian patrimony law made the Phiale "stolen" property under the National Stolen Property Act. Unless the National Stolen Property Act is considered, there was no law, regulation, tariff, embargo, or directive that would have

prevented the Phiale from entering the United States.[4] Thus, the Phiale could only have been "an item imported into the United States in violation of law" if the violation alleged was the purportedly false statement about its country of origin on a Customs entry form which, in and of itself, could not have prevented the Phiale's importation. Indeed, under *Bajakajian* improperly reported property can no more be "contraband" than it could be (as the Court held therein) the "instrumentality" of the customs violation. If, therefore, there is anything "classic" about the Second Circuit's conclusion on this issue, it is that it is based on a "classic" case of "bootstrapping," and not on any "classic" definition of "contraband."

Moreover, *Bajakajian* makes clear that forfeiture of the Phiale solely on the basis of the false statement on the Customs form would violate the Eighth Amendment. The Court held that even though Bajakajian had pleaded guilty to the underlying crime, he was subject to a maximum penalty of six months imprisonment and a $5,000 fine, and forfeiture of the entire $357,000 in unreported currency would be grossly disproportional to his wrongdoing. Here, Steinhardt paid more than $1 million for the Phiale, and the government has never charged him (or anyone else) with any crime in connection with its importation. Indeed, there is no evidence

---

4. In the portion of *Bennis* upon which the Second Circuit relied for this conclusion, by contrast, the "smuggled goods" to which Justice Stevens referred were "objects the possession of which, without more, constitutes a crime." *Bennis*, 516 U.S. at 459 (quoting *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965)). Justice Stevens went on to cite, as examples of such "contraband," "adulterated food, sawed-off shotguns, narcotics and smuggled good" — none of which, unlike the Phiale, could be brought into the United States without violating express statutory prohibitions concerning importation of goods of that type.

(and the government does not even claim) that Steinhardt knew of, much less participated in, the misstatement on the Customs forms. Moreover, even if Steinhardt had been charged with and convicted of violating 18 U.S.C. § 542, he too would have been subject to a maximum penalty of six months imprisonment and a $5,000 fine.[5] Thus, if forfeiture is permitted, Steinhardt, even more than Bajakajian, would suffer a penalty that is grossly disproportional to the gravity of his conduct.

In addition to raising a substantial issue relating to this Court's understanding of the Eighth Amendment, the Second Circuit's decision also conflicts with post-*Bajakajian* decisions by the Third, Sixth, Ninth, and Eleventh Circuits, as well as by the highest court of District of Columbia — all of which (unlike the Second Circuit) applied an Excessive Fines Clause analysis to civil *in rem* forfeitures. *See Yskamp v. DEA*, 163 F.3d 767 (3d Cir. 1998); *United States v. Real Property Known and Numbered As 415 East Mitchell Avenue*, 149 F.3d 472, 476-77 (6th Cir. 1998); *United States v. 3814 NW Thurman Street, Portland Oregon*, 164 F.3d 1191 (9th Cir. 1999); *United States v. 817 N.E. 29th Drive, Wilton Manors, Florida*, 175 F.3d 1304 (11th Cir. 1999), *petition for cert. filed* (Sept. 7, 1999) (No. 99-6374); *One 1995 Toyota Pick-Up Truck v. District of Columbia*, 718 A.2d 558 (D.C. Ct. App. 1998).

---

5. Because the misstatement as to the Phiale's country of origin did not result in any tax loss, the base level offense would have been 4. U.S. Sentencing Guidelines Manual § 2T3.1(a) (1995). Steinhardt has no criminal record, and therefore the maximum term of imprisonment would have been six months and the maximum fine would have been $5,000. *Id.* at Ch. 5, Pt. A and § 5E1.2(c).

The Second Circuit's misconstruction of this Court's prior precedents regarding the scope of the protection afforded by the Eighth Amendment's Excessive Fines Clause requires remedial attention. Left uncorrected, the Second Circuit's decision promises to spawn further inconsistent decisions on this issue. This case provides an opportunity for this Court to address the sources of this confusion and to furnish much needed guidance to the lower federal courts on this important question.

CONCLUSION

This case involves questions of critical importance to the proper construction of the nation's customs laws and how those laws are to be applied so as not to do violence to the Fifth and Eighth Amendments. If not reviewed, the Second Circuit's decision will lead to further unfair results, cause inconsistencies in the administration of Customs entry regulations, and cast a shadow over the protections generally afforded by the Fifth and Eighth Amendments. For these and all the foregoing reasons, Steinhardt's petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

FREDERICK P. SCHAFFER
Counsel of Record
SCHULTE ROTH & ZABEL LLP
Attorneys for Petitioner
900 Third Avenue
New York, New York 10022
(212) 756-2000

Of Counsel:

MICHAEL S. FELDBERG
DENNIS C. O'DONNELL

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED JULY 12, 1999

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1998

(Argued: October 14, 1998 Decided: JUL 12 1999)

Docket No. 97-6319

UNITED STATES OF AMERICA,

Plantiff-Appellee,

v.

AN ANTIQUE PLATTER OF GOLD, known as a GOLD PHIALE MESOMPHALOS C. 400 B.C.,

Defendant-in-rem,

MICHAEL H. STEINHARDT,

Claimant-Appellant,

REPUBLIC OF ITALY,

Claimant-Appellee.

Appendix A

Before: WINTER, *Chief Judge*, RESTANI,* *Judge*, and MUKASEY,** *District Judge*.***

* * *

WINTER, *Chief Judge*:

Michael H. Steinhardt appeals from Judge Jones's ordering of the forfeiture of a "Phiale," an antique gold platter. The district court held that false statements on the customs entry forms and the Phiale's status as stolen property under Italian law rendered its importation illegal. As such, the Phiale was subject to forfeiture.

Steinhardt contends that: (i) the false statements on the customs forms were not material under 18 U.S.C. § 542, (ii) stolen property under the National Stolen Property Act ("NSPA") does not encompass property presumed to belong to the state under Italian patrimony laws, (iii) both statutes

---

* The Honorable Jane A. Restani of the United States Court of International Trade, sitting by designation.

** The Honorable Michael B. Mukasey of the United States District Court for the Southern District of New York, sitting by designation.

*** Pursuant to 28 U.S.C. § 46(b) and an order of the Chief Judge of this Court certifying a judicial emergency, this case was heard by a panel consisting of the Chief Judge of this Court, one judge of the United States District Court sitting by designation, and one judge of the United States Court of International Trade sitting by designation.

afford him an innocent owner defense, and (iv) the forfeiture violates the Eighth Amendment. We hold that the false statements on the customs forms were material and, therefore, need not reach issue (ii). We further hold that there is no innocent owner defense and that forfeiture of the Phiale does not violate the Eighth Amendment.

BACKGROUND

At issue is a Phiale of Sicilian origin that dates from the 4th Century B.C. Its provenance since then is largely unknown, other than its possession by Vincenzo Pappalardo, a private antique collector living in Sicily, who traded it in 1980 to Vincenzo Cammarata, a Sicilian coin dealer and art collector, for art works worth about $20,000. Cammarata sold it in 1991 to William Veres, the owner of Stedron, a Zurich art dealership, for objects worth about $90,000.

Veres brought the Phiale to the attention of Robert Haber, an art dealer from New York and owner of Robert Haber & Company. In November 1991, Haber traveled to Sicily to meet with Veres and examine the Phiale. Haber informed Steinhardt, a client with whom he had engaged in 20-30 previous transactions, of the piece. Haber told Steinhardt that the Phiale was a twin to a piece in the Metropolitan Museum of Art in New York City and that a Sicilian coin dealer (presumably Cammarata) was willing to guarantee the piece's authenticity.

On December 4, 1991, Haber, acting for Steinhardt, finalized an agreement to purchase the Phiale for slightly more than $1 million — plus a 15% commission, making

the total price paid by Steinhardt approximately $1.2 million. Haber and Veres also agreed to a "Terms of Sale," which stated, *inter alia*, that "[i]f the object is confiscated or impounded by customs agents or a claim is made by any country or governmental agency whatsoever, full compensation will be made immediately to the purchaser." It further provided that a "letter is to be written by Dr. [Giacomo] Manganaro that he saw the object 15 years ago in Switz."[1] In fact, Dr. Manganaro, a professor of Greek history and Numismatics, had examined the Phiale in 1980 in Sicily and had determined thereafter that it was authentic and of Sicilian origin.

On December 10, 1991, Haber flew from New York to Zurich, Switzerland, and then proceeded to Lugano, near the Italian border, where he took possession of the Phiale on December 12. The transfer was confirmed by a commercial invoice issued by Stedron, describing the object as "ONE GOLD BOWL — CLASSICAL . . . DATE — C. 450 B.C. . . . . VALUE U.S. $250,000." The next day, Haber sent a fax to Jet Air Service, Inc. ("Jet Air"), Haber's customs broker at John F. Kennedy International Airport in New York, which included a copy of the commercial invoice. Jet Air prepared an Entry/Immediate Delivery form (Customs Form 3461) to obtain release of the Phiale prior to formal entry. This form listed the Phiale's country of origin as "CH," the code for Switzerland. In addition, Jet Air prepared an Entry Summary form (Customs Form 7501), which also listed the

---

1. This provision of the Terms of Sale is handwritten. It replaced a sentence that read: "A letter is to be written by Dr. Manganaro which is an unconditional guarantee of the authenticity and Swiss origin of the object."

country of origin as "CH" and stated the Phiale's value at $250,000, as Haber's fax had indicated. Haber was listed as the importer of record.

On December 15, Haber returned to the United States from Zurich with the Phiale and later gave it to Steinhardt.[2] Before completing the purchase, Steinhardt had the piece authenticated through a detailed examination by the Metropolitan Museum of Art. Thereafter, the Phiale was displayed in his home from 1992 until 1995.

Under Article 44 of Italy's law of June 1, 1939, an archaeological item is presumed to belong to the state unless its possessor can show private ownership prior to 1902. On February 16, 1995, the Italian government submitted a Letters Rogatory Request to the United States seeking assistance in investigating the circumstances of the Phiale's exportation and asking our government to confiscate it so that it could be returned to Italy. In November 1995, the Phiale was seized from Steinhardt pursuant to a warrant. Soon thereafter the United States filed the present *in rem* civil forfeiture action. The government claimed that forfeiture was proper under 18 U.S.C. § 545 because of false statements on the customs forms. It also claimed that forfeiture was proper under 19 U.S.C. § 1595a(c) because the Phiale was stolen property under the NSPA as a result of Article 44 of Italy's patrimony laws.

---

2. Haber himself has provided no details surrounding the Phiale's purchase and importation. In his February 1, 1996 deposition, he exercised his Fifth Amendment right by refusing to answer any questions asked by the government or Steinhardt's attorney.

Steinhardt entered the proceeding as a claimant, and he and the government moved for summary judgment. In granting judgment for the government, *see United States v. An Antique Platter of Gold*, 991 F. Supp. 222 (S.D.N.Y. 1997), the district court held that the misstatement of the country of origin was material, *see id.* at 228-30, and, alternatively, that the Phiale was stolen property under Italian law, *see id.* at 231-32. The court also held that an innocent owner defense was not available under either statute, *see id.* at 230-32, and that the forfeiture did not violate the Excessive Fines Clause, *see id.* at 232-33. This appeal followed.

DISCUSSION

We review the grant of summary judgment *de novo*. *See Bedoya v. Coughlin*, 91 F.3d 349, 351 (2d Cir. 1996). Summary judgment is inappropriate if there is a genuine dispute on any issue of material fact that could lead a reasonable factfinder to return a judgment for the nonmoving party. *See* Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

As noted, the district court found that summary judgment was proper on either of two independent statutory bases. We hold that importation of the Phiale violated 18 U.S.C. § 545 because of the false statements on the customs forms. We need not, therefore, address whether the NSPA incorporates concepts of property such as those contained in the Italian patrimony laws. *Cf. United States v. McClain*, 545 F.2d 988, 994-97 (5th Cir. 1977) (adopting broad definition of property under NSPA).

Appendix A

Section 545 prohibits the importation of merchandise into the United States "contrary to law" and states that material imported in such a manner "shall be forfeited." 18 U.S.C. § 545.[3] The government claims that the importation of the Phiale was illegal because it violated 18 U.S.C. § 542, which prohibits the making of false statements in the course of importing merchandise into the United States. Steinhardt claims, however, that an element of a Section 542 violation is that such a false statement must be material and that the government has failed to show materiality in the instant case, at least for purposes of summary judgment. He further

---

3. Section 545 reads, in relevant part:

> Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law [shall be subject to criminal penalties.]
>
> . . . .
>
> . . . .
>
> Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States.

18 U.S.C. § 545.

contends that Section 545 provides him with an innocent owner defense and that forfeiture would violate the Excessive Fines Clause of the Eighth Amendment in light of the Supreme Court's recent decision in *United States v. Bajakajian*, 118 S. Ct. 2028 (1998).

A. *Materiality Under Section 542*

Section 542 states in pertinent part:

> Whoever enters or introduces . . . into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, . . . or makes any false statement in any declaration without reasonable cause to believe the truth of such statement, or procures the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement [shall be guilty of a crime].

18 U.S.C. § 542. There can be no dispute that the designation of Switzerland as the Phiale's country of origin and the listing of its value of $250,000 were false. Haber had examined the Phiale in Sicily about a month before the sale to Steinhardt, and that sale was for $1 million plus 15% commission.

We have previously held that Section 542 does include a materiality requirement. *See United States v. Avelino*, 967 F.2d 815, 817 (2d Cir. 1992) ("[F]alse statements under

Section 542 are necessarily material because the importation must be 'by means of [the] false statement.' "). While the government argues to the contrary, we see no reason to revisit our decision in *Avelino*.

The dispute pertinent to this appeal concerns the proper test for materiality. Steinhardt argues for a "but for" test of materiality, *i.e.*, a false statement is material only if a truthful answer on a customs form would have actually prevented the item from entering the United States. The district court, however, employed a "natural tendency" test, asking whether the false statement would have a natural tendency to influence customs officials. *See An Antique Platter of Gold*, 991 F. Supp. at 230. The circuits are divided as to the proper test. The Fifth and Ninth Circuits have adopted a but for test, *see United States v. Corcuera-Valor*, 910 F.2d 198, 199-200 (5th Cir. 1990); *United States v. Teraoka*, 669 F.2d 577, 579 (9th Cir. 1982), while the First Circuit has come down in favor of the natural tendency test, *see United States v. Holmquist*, 36 F.3d 154, 158-61 (1st Cir. 1994); *see also United States v. Bagnall*, 907 F.2d 432, 436-37 (3d Cir. 1990) (noting, without deciding, that all false statements affecting the importation process are material under Section 542). We adopt the natural tendency test.[4]

---

4. Appellant argues that in *United States v. Meldish*, 722 F.2d 26 (2d Cir. 1983), we adopted the "but for" test the Ninth Circuit used in *Teraoka*. *Meldish*, however, cited *Teraoka* only for the basic proposition that "Section 542 concerns itself only with whether a false statement was made to effect or attempt to effect the entry of the goods in question." *Meldish*, 722 F.2d at 28 (citing *Teraoka*, 669 F.2d at 579). In no way did *Meldish* purport to adopt the "but for" standard employed in *Teraoka*.

The statutory language, caselaw, and the statutory purpose lead us to this conclusion. First, the statute prohibits importations "by means of" a false statement. Although there is overlap, this language is not synonymous with "because of," *see Holmquist*, 36 F.3d at 159 (examining in detail statutory language of Section 542), and ought not be read so narrowly. Instead, the ordinary meaning of the statutory language requires only that the false statements be an integral part of the importation process. In this case, the false statements were on custom forms and thus easily meet the by means of requirement.

Second, the Supreme Court has noted that "[t]he most common formulation of [materiality] . . . is that a concealment or misrepresentation is material if it 'has a natural tendency to influence or was capable of influencing, the decision of' the decisionmaking body to which it was addressed." *Kungys v. United States*, 485 U.S. 759, 770 (1988) (citation omitted). Both the Supreme Court and this circuit have employed such a standard in numerous contexts. *See, e.g., id.* at 771 (test for materiality under 8 U.S.C. § 1451(a) is "whether the misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect, the official decision"); *United States v. Regan*, 103 F.3d 1072, 1081 (2d Cir. 1997) (employing natural tendency test for 18 U.S.C. § 1623); *see also Neder v. United States*, __ S. Ct. __, 1999 WL 373186, at *10 (U.S. June 10, 1999). These decisions provide a solid basis for adopting a natural tendency test under Section 542.

Finally, the natural tendency approach is far more consistent with the purpose of the statute — to ensure

truthfulness of representations made during importation — than is a but for test. *See Bagnall*, 907 F.2d at 436. Under a but for test, lying would be more productive because the government would bear the difficult burden of proving what would have happened if a truthful statement had been made. Moreover, under such a test, liability would not attach for misstatements in cases where truthful answers would still have enabled the goods to enter the United States. Importers have incentives to lie for reasons not related to achieving actual entry of the goods — *e.g.*, to reduce the duties payable or to obtain expeditious customs treatment. *Cf. Holmquist*, 36 F.3d at 160 (noting that the but for test makes it "more attractive for importers . . . to practice strategic forms of deception under the guise of immateriality"). The statutory purpose would thus be frustrated by the narrow reading suggested by appellant.

We therefore hold that "a false statement is material under [S]ection 542 if it has the potential significantly to affect the integrity or operation of the importation process as a whole, and that neither actual causation nor harm to the government need be demonstrated." *Holmquist*, 36 F.3d at 159.[5] For a trier of fact to determine whether a statement

---

5. This standard is also consistent with our holding in *United States v. Greenberg*, 735 F.2d 29, 31 (2d Cir. 1984):

> Where a false statement is made to a public body or its representative, materiality refers to the impact that the statement may reasonably have on the ability of that agency to perform the functions assigned to it by law. The question is not what effect the statement actually had[ ] . . . . The question is rather whether the statement had the potential for an obstructive or inhibitive effect.

can significantly affect the importation process, it need ask only whether a reasonable customs official would consider the statements to be significant to the exercise of his or her official duties. This analysis is analogous to the securities context, where a statement (or omission) is material if there is a "substantial likelihood" that a reasonable investor would view it as "significantly alter[ing] the 'total mix' of information made available." *TSC Indus. Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *see also Levitin v. PaineWebber Inc.*, 159 F.3d 698, 702 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 1039 (1999). *Folger Adam Co. v. PMI Indus., Inc.*, 938 F.2d 1529, 1532-34 (2d Cir. 1991) (discussing materiality under securities laws). Moreover, this test of materiality applies not only to the decision to admit an item but also decisions as to processing, *e.g.*, expediting importation. *See Bagnall*, 907 F.2d at 436. With this test in mind, we turn to the misstatements on the Phiale's entry form.

Steinhardt contends that even under a natural tendency test, the misstatements are immaterial. He claims that the customs officials lacked statutory authority to seize the Phiale and that it was customs policy not to review information about the country of origin of such an object. He further argues that the statement of the Phiale's value was relevant only to the imposition of the processing fee, which was unaffected by the misstatement. Because the misstatement of the country of origin was material as a matter of law and thus proper grounds for summary judgment, we need not examine the misstatement of value.

Customs Directive No. 5230-15, regarding the detention and seizure of cultural property, fatally undermines

Steinhardt's contention that listing Switzerland as the country of origin was irrelevant to the Phiale's importation. The Directive advised customs officials to determine whether property was subject to a claim of foreign ownership and to seize that property. Customs Directive No. 5230-15 (Apr. 18, 1991) [hereinafter "Directive"]. An item's country of origin is clearly relevant to that inquiry.

Steinhardt contends, however, that the Directive does not cover the Phiale and, therefore, the misstatements could not have been material because there was no legal basis for the Phiale's seizure. We disagree. The Directive provides a basis for seizing cultural property under the NSPA in the seizure provisions of 19 U.S.C. § 1595a(c). Seizure of the Phiale would clearly be authorized by this provision under *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977), which held that violations of a nation's patrimony laws are covered by the NSPA. Because Steinhardt asserts that *McClain* was improperly decided, he claims that the customs officials lacked a statutory basis to seize the Phiale.

This argument, however, misperceives the test of materiality. Regardless of whether *McClain*'s reasoning is ultimately followed as a proper interpretation of the NSPA, a reasonable customs official would certainly consider the fact that *McClain* supports a colorable claim to seize the Phiale as having possibly been exported in violation of Italian patrimony laws. Indeed, the Directive explicitly references the *McClain* decision and informs officials that if they are unsure of the status of a nation's patrimony laws, they should notify the Office of Enforcement. *See* Directive at 9. Knowing that the Phiale was from Italy would, therefore, be of critical importance.

Even if such a seizure might ultimately fail in court — an issue we need not address — the misstatement was still material because it had the "potential significantly to affect the integrity or operation of the importation process" — the manner in which Customs handles the assessment of duties and passage of goods into the United States. *Holmquist*, 36 F.3d at 159. To decide otherwise would give an importer license and incentive to mislead customs officials whenever the legal basis of a seizure was somewhat unclear. If the good was actually imported without challenge then or later, the importer's goal would be achieved. If the good was stopped at customs or was later the subject of a forfeiture proceeding, the importer would still have opportunity to challenge the statutory basis for seizure. *See id.* at 160. As noted above, we decline to create such counter-productive incentives.

Steinhardt makes two additional arguments — one relying on Customs Service practices, the other on the Supreme Court's decision in *Kungys* — in an attempt to demonstrate that the misstatement of country of origin was not material as a matter of law. These contentions are also flawed.

He first claims that the statements were immaterial because the Customs Service had no policy of relying upon this information. In support, he provides examples in which items, such as those that listed Italy as the country of origin, were not detained. First, even if country of origin were not required, as he claims, the misstatement could still influence a customs official. *See e.g.*, *United States v. Masters*, 612 F.2d 1117, 1120 (9th Cir. 1979) (" 'It is immaterial that the

filing . . . may not have been required by Air Force regulations in the particular circumstances . . . .' "). Misinformation that is volunteered can affect the importation process. For example, if the customs forms stated that the Phiale had been in private hands since 1800 (and thus not subject to Italian patrimony laws, *see* Art. 44 of Italy's Law of June 1, 1939, No. 1089), this information, which is not required, would certainly affect the judgment of a reasonable customs official. Even if Customs did not require this information, that would be insufficient to defeat summary judgment.

Second, Steinhardt's provision of instances where items entered the country without interference fails to create a disputed issue of material fact. The record does not demonstrate whether any curative oral representations were made at the time of the importation of these particular items. Moreover, virtually all of the items were valued at less than $100,000, significantly below the Phiale's value. Most critically, even if lax customs officials failed to act appropriately with some of these items, this would not preclude a finding of materiality because the proper test involves a reasonable customs official, not the least vigilant one. As the Directive makes clear, customs officials were alerted to *McClain* and violations of cultural property laws prior to the importation of the Phiale. A reasonable customs official should have viewed the Phiale's true country of origin as highly significant.

Finally, Steinhardt's reliance on the Supreme Court's decision in *Kungys* is misplaced. *Kungys* simply reaches the unsurprising conclusion that not all misstatements are

material under the "natural tendency" test. However, its facts are inapposite to the instant case. *Kungys* involved a misstatement of a person's date and place of birth on his naturalization petition. Although the Court overturned the lower court's finding that this information was material, its holding turned on what the government had attempted to prove and what the lower court had found. The Court stated that "[t]here has been *no suggestion* that [the date and place of birth] were themselves relevant to his qualifications for citizenship," *Kungys*, 485 U.S. at 774 (plurality opinion) (emphasis added), and there was no finding that "the true date and place of birth would predictably have disclosed other facts relevant to his qualifications." *Id.* Instead of focusing on the impact of the misrepresentation, the government's evidence went to a discrepancy between the information used on the naturalization petition compared with an earlier visa application. A plurality of the Court found this analysis to be improper and stated that "what is relevant is what would have ensued from official knowledge of the misrepresented fact . . . not what would have ensued from official knowledge of inconsistency between a posited assertion of the truth and an earlier assertion of falsehood." *Id.* at 775. In the instant case, the relevant inquiry clearly relates to the designation of country of origin, and it is this information that has a natural tendency to influence a reasonable customs official. The statements were thus material under Section 542.

B. *Innocent Owner Defense*

Steinhardt next contends that even if the statements were material, Section 545 affords him an innocent owner defense. Our discussion will assume for purposes of analysis that

Steinhardt is such an innocent owner. While numerous statutes contain an explicit innocent owner defense, *see, e.g.*, 18 U.S.C. § 981(a)(2); 21 U.S.C. §§ 881(a)(4)(C), 881(a)(7), Section 545 does not, and there is no reason to believe that the omission in Section 545 was anything but deliberate. Steinhardt argues, however, that the Due Process Clause entitles him to such a defense.

This argument has been rejected by the Supreme Court. In *Bennis v. Michigan*, 516 U.S. 442 (1996), the Court upheld a Michigan statute that permitted the forfeiture of an automobile co-owned by an innocent owner. In its analysis, the Court traced the long history of forfeiture laws that did not provide for such a defense. *See id.* at 446-51; *see also United States v. Bajakajian*, 118 S. Ct. 2028, 2034 (1998) ("Historically, the conduct of the property owner [in an in rem proceeding] was irrelevant; indeed the owner of forfeited property could be entirely innocent of any crime."); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974) ("[T]he innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense."); *Origet v. United States*, 125 U.S. 240, 246 (1888) ("[T]he merchandise is to be forfeited irrespective of any criminal prosecution . . . . The person punished for the offense may be an entirely different person from the owner of the merchandise, or any person interested in it."). Against this long line of precedent, Steinhardt relies principally on dicta from *Calero-Toledo* and our decision in *United States v. One Tintoretto Painting*, 691 F.2d 603 (2d Cir. 1982), which also relied on the *Calero-Toledo* dicta. However, the *Bennis* Court explicitly rejected this language, *see Bennis*, 516 U.S. at 449-50, and we must follow suit.

C. *Eighth Amendment*

While Steinhardt raised an Eighth Amendment claim in the district court, he did not raise it on appeal. Nonetheless, he now contends that under the Supreme Court's recent decision in *United States v. Bajakajian*, 118 S. Ct. 2028 (1998), handed down after the briefs were filed in this case, the forfeiture violates the Excessive Fines Clause of the Eighth Amendment. We disagree.

Bajakajian involved a criminal prosecution for failing to report the transporting of more than $10,000 out of the United States. The Court held that this proceeding triggered the Excessive Fines Clause and that the seizure of the entire amount, in excess of $357,000, would violate this constitutional safeguard. Critical to the Court's analysis, however, was that the forfeiture pursuant to Section 982(a)(1) of Title 18, which Mr. Bajakajian pleaded guilty to violating, constituted a punishment. *See Bajakajian*, 118 S. Ct. at 2033-35. In making this determination, the Court focused on several factors: the fine was imposed at the culmination of a criminal proceeding that required a conviction of the underlying felony and could not have been imposed upon an innocent party. *See id.* at 2034.

All of these factors are absent from the forfeiture at issue in the instant case, which bears all the "hallmarks of the traditional civil in rem forfeitures." *Id.* at 2035. First, the forfeiture here was not part of a criminal prosecution. *See id.* at 2034-35 (distinguishing cases directed against "guilty property" and noting that "[t]raditional in rem forfeitures were . . . not considered punishment against the individual

for an offense"). While Section 545 is part of the criminal code, this fact alone does not render the forfeiture punitive.[6] Although the question whether a proceeding is civil or criminal is certainly relevant, it is not dispositive. *See e.g.*, *Austin v. United States*, 509 U.S. 602, 621-22 (1993). Thus, the fact that the present action is a civil in rem proceeding weighs against a finding that it is punitive.

Even more important to the inquiry is the nature of the statute that authorizes forfeiture. As opposed to Section 982(a), the provisions at issue in *Bajakajian*, Section 545 is a customs law, traditionally viewed as non-punitive. *See Taylor v. United States*, 44 U.S. (3 How.) 197, 210 (1845) (Story, J.) (stating that laws providing for in rem forfeiture of goods imported in violation of customs laws, although in one sense "imposing a penalty or forfeiture[,] . . . truly deserve to be called remedial"). The Phiale is thus classic contraband, an item imported into the United States in violation of law. *See Bennis*, 516 U.S. at 459 (Stevens, J., dissenting) (describing "smuggled goods" as "pure contraband"); Bajakajian's money, which he was attempting

---

6. The Supreme Court's decision in *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232 (1972) (per curiam) is not to the contrary. That case involved an acquittal after a trial for violating Section 545. A civil forfeiture pursuant to 19 U.S.C. § 1497 followed. The Court held that the latter proceeding did not violate the Double Jeopardy Clause. While it noted that Section 545 is a criminal provision, *see id.* at 236, the Court had no reason to reach the issue of whether a Section 545 civil forfeiture proceeding such as the instant one was punitive. Instead, it simply determined that the forfeiture at issue was "a civil sanction." *Id.*; *see also United States v. Ursery*, 518 U.S. 267, 276 (1996) (discussing *Emerald Cut Stones*).

to export, was not. It is forfeiture of the former that *Bajakajian* continues to recognize as nonpunitive and outside the scope of the Excessive Fines Clause.

We therefore affirm.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AND FILED NOVEMBER 14, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

95 Civ. 10537 (BSJ)

UNITED STATES OF AMERICA,

Plaintiff,

– against –

AN ANTIQUE PLATTER OF GOLD, KNOWN AS A GOLD PHIALE MESOMPHALOS, C. 400 B.C.,

Defendant-in-rem.

MICHAEL H. STEINHARDT,

Claimant.

REPUBLIC OF ITALY,

Claimant.

MEMORANDUM & ORDER

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Appendix B

This case involves the forfeiture of an antique gold platter known as a phiale mesomphalos (the "Phiale"). Pending are claimant Michael H. Steinhardt's and plaintiff United States of America's cross motions for summary judgment. For the reasons stated below, summary judgement is granted to the United States.

FACTS[1]

The defendant-in-rem is a 4th Century B.C. antique gold platter of Sicilian origin. Its circuitous path to the United States began sometime around 1980, and culminated in the current forfeiture action.

In 1980, Vincenzo Pappalardo, a private antique collector living in Catania, Sicily in Italy approached Dr. Giacomo Manganaro, a professor of Greek history and Numismatics, for an expert opinion regarding the authenticity of the Phiale, which was in Pappalardo's collection at the time. The Phiale had an inscription along its edge, written in a Greek Doric dialect that had been spoken in the ancient Greek-Sicilian colonies. Based on that inscription and his own study, Dr. Manganaro concluded that the Phiale was authentic and of Sicilian origin.[2]

---

1. The following facts are from the parties' Statements Pursuant to Local Rule 3(g), and from their affidavits and exhibits. All facts presented, unless otherwise noted, are admitted or uncontroverted by the parties.

For clarity of reading, cites to the record are in footnotes.

2. Report of Information for Testimonial Evidence of Giacomo Manganaro (hereinafter "Manganaro Report") at 1-3; Government

(Cont'd)

Appendix B

Later in 1980, Pappalardo traded the Phiale to Vincenzo Cammarata, a Sicilian coin dealer and art collector, for art works valued at about 30 million Italian lire (approximately $20,000).[3]

In 1991, Cammarata showed the Phiale and a gold-plated silver cup to Silvana Verga, an employee of the Monuments and Fine Arts Bureau in Palermo, Sicily, and to Enzo Brai, an Italian photographer. Cammarata told Verga and Brai that the Phiale and silver cup had been found near Caltavuturo, Sicily during the completion of some electrical work by an Italian utility company.[4]

Cammarata also gave a photograph of the Phiale to William Veres, an art dealer and personal friend who owned an art dealership company named Stedron based in Zurich, Switzerland. Veres, a specialist in antiquities, became interested in acquiring the Phiale despite some doubts as to

---

(Cont'd)
Statement Pursuant to Rule 3(g) (hereinafter "Government Statement") at ¶¶ 1, 2; Steinhardt Statement in Opposition to Plaintiff's Statement Pursuant to Rule 3(g) (hereinafter "Steinhardt Response") at ¶¶ 1, 2 (no information as to these facts).

3. Transcript of Interrogatory of Person Under Investigation of Vincenzo Cammarata (hereinafter "Cammarata Transcript") at 2-3; Government Statement at ¶ 3; Steinhardt Response at ¶ 3 (no information as to these facts).

4. Transcript of Interrogatory of Person Under Investigation of Silvana Verga (hereinafter "Verga Transcript") at 3; Government Statement at ¶¶ 4-6; Cammarata Transcript at 3-4; Steinhardt Response at ¶¶ 4-6 (no information as to these facts).

its authenticity, and later acquired the Phiale from Cammarata in exchange for objects worth about 140 million lire (approximately $90,000).[5]

Veres brought the Phiale to the attention of Robert Haber,[6] an American art dealer and owner of Robert Haber & Company Ancient Art in New York City.[7] In November, 1991, Haber traveled to Sicily to meet Veres and to see the Phiale in person.[8]

Haber became interested in the Phiale and believed that claimant Michael Steinhardt, a client of his, might be interested in acquiring it.[9] Haber had previously sold

---

5. Cammarata Transcript at 3-4; Government Statement at ¶¶ 7, 9, 17; Steinhardt Response at ¶¶ 7, 9, 17 (no information as to these facts).

6. At a February 1, 1996 deposition, subsequent to the Government's seizure of the Phiale and the commencement of the current action, Haber invoked the Fifth Amendment and refused to answer any questions regarding the purchase and importation of the Phiale. *See* Deposition of Robert Haber (hereinafter "Haber Deposition").

7. Government Statement at ¶ 8; Steinhardt's Response at ¶ 8 (no information as to this fact).

8. Travel Itinerary for Robert Haber, submitted as Government Exhibit 4; Government Statement at ¶ 10; Steinhardt's Response at ¶ 10 (admitting this fact).

9. Government Statement at ¶ 11; Steinhardt's Response at ¶ 11 (admitting this fact).

Steinhardt 20 to 30 objects, totaling $4 million to $6 million in sales.[10] Haber told Steinhardt that the Phiale was the twin of one belonging to the Metropolitan Museum of Art in New York City, and that its seller was a Sicilian coin dealer.[11]

Thereafter, Steinhardt, with Haber as an intermediary, agreed to purchase the Phiale. Under the final terms of the agreement, as incorporated in a telefax dated December 4, 1991, Steinhardt agreed to pay 1.3 billion lire (over $1 million) in two equal wire transfer installments plus a 15% commission fee for the Phiale. In total, Steinhardt agreed to pay approximately $1.2 million to acquire the Phiale, the first installment of which would be wired to Credit Suisse, New York in favor of Veres' Stedron account at Bank Leu in Zurich, Switzerland.[12]

In addition, a one page document entitled "Terms of Sale" and signed by Veres provided that "[i]f the object is confiscated or impounded by customs agents or a claim is made by any country or governmental agency whatsoever, full compensation will be made immediately to the purchaser."[13] The Terms of Sale further provided that "[a]

---

10. Steinhardt Deposition at 35-36.

11. Government Statement at ¶¶ 12, 13; Steinhardt Response at ¶¶ 12, 13 (admitting this fact).

12. December 4, 1991, Telefax from Laura Siegel, submitted as Government Exhibit 6; Government Statement at ¶¶ 19-23; Steinhardt Response at ¶¶ 19-23 (admitting these facts).

13. Terms of Sale for the Phiale, submitted as Government Exhibit 5, at ¶ 6; Government Statement at ¶ 18; Steinhardt Response at ¶ 18 (admitting this fact).

letter is to be written by Dr. Manganaro that he saw the object 15 years ago in Switz."[14]

On December 6, 1991, Steinhardt wired the first money transfer installment from his account in New York to Veres' Stedron account.[15]

On December 10, 1991, Haber flew from New York to Zurich. From there he traveled across the Swiss Alps to Lugano, Switzerland, a town near the Swiss-Italian border that is about a three-hour car drive from Zurich.[16] On or about December 12, 1991, Haber took possession of the Phiale from

---

14. Government Exhibit 5 at ¶ 3; Government Statement at ¶ 18; Steinhardt Response at ¶ 18 (admitting this fact).

The portion of the clause involving Dr. Manganaro's letter had been added by hand by Haber. The original typed language read, "[a] letter is to be written by Dr. Manganaro which is an unconditional guarantee of the authenticity and Swiss origins of the object." Government Exhibit 5 at ¶ 3.

Dr. Manganaro claims that he never agreed to certify that the Phiale was authentic, that it was of Swiss origin, or that he had seen it in Switzerland. Manganaro Report at 4.

15. December 6, 1991 Wire Transfer from Steinhardt to Stedron, submitted as Government Exhibit 14; Government Statement at ¶ 24; Steinhardt Response at ¶ 24 (admitting this fact).

16. Government Exhibits 4; Haber's American Express Card account statements, submitted as Government Exhibit 7; Government Statement at ¶¶ 25-26; Steinhardt Response at ¶¶ 25-26 (no information as to these facts).

Veres.[17] The transfer was confirmed in a commercial invoice signed by Veres and issued by Stedron, describing the object as "ONE GOLD BOWL — CLASSICAL . . . DATE — C. 450 B.C. . . . VALUE U.S. $250,000."[18]

On December 13, 1991, Haber sent a two-page fax to Larry Baker at Jet Air Service, Inc. ("Jet Air"), Haber's customs broker at J.F.K. International Airport in New York. The fax included information about Haber's return flight and a copy of the commercial invoice for the Phiale.[19]

Jet Air, in turn, prepared two Customs forms (collectively the "Customs forms"). First, Jet Air prepared an Entry and Immediate Delivery form (Customs Form 3461) to obtain release of the Phiale by a Customs inspection team prior to formal entry. This form listed the Phiale's country of origin as "CH," the code for Switzerland. Second, Jet Air prepared an Entry Summary form (Customs Form 7501), which also listed the Phiale's country of origin as "CH." In addition, this form listed the Phiale's value at $250,000, despite the fact that it had just been sold for over $1 million. The form made no mention of the Phiale's Sicilian origin or

---

17. December 12, 1991, Commercial Invoice from Stedron, submitted as Government Exhibit 8; Government Statement at ¶ 27; Steinhardt Response at ¶ 27 (admitting this fact).

18. Government Exhibit 8; Government Statement at ¶ 27; Steinhardt Response at ¶ 27 (admitting this fact).

19. Government Statement at ¶¶ 31, 32; Steinhardt Response at ¶¶ 31, 32 (admitting these facts).

of its Italian history. Haber was listed as the importer of record.[20]

On or about December 14, 1991, Haber returned from Lugano to Zurich.[21] On December 15, 1991, Haber flew from Geneva to J.F.K. International Airport in New York carrying the Phiale. From there, he entered the United States with the Phiale.[22]

On January 6, 1992, Haber or Steinhardt consigned the Phiale to the Metropolitan Museum of Art to determine its authenticity. The museum declared the Phiale authentic and returned it to Haber or Steinhardt on January 24, 1992.[23]

On January 29, 1992, Steinhardt wired the second installment from his New York account to the Stedron account. On March 11, 1992, Steinhardt wired Haber's

---

20. Customs Forms 7501 and 3461, submitted as Government Exhibit 10; Government Statement at ¶¶ 33, 34, 37, 38; Steinhardt Response at ¶¶ 33, 34, 37, 38 (admitting these facts).

21. Haber's American Express Card account statements indicate that he stayed in a hotel in Lugano on the nights of December 12 and December 13, 1991. *See* Government Exhibit 7.

22. Government Statement at ¶ 36; Steinhardt Response at ¶ 36 (admitting these facts).

23. Metropolitan Museum of Art Records Regarding Examination of Gold Phiale, submitted as Government Exhibit 11; Government Statement at ¶¶ 39-41; Steinhardt Response at ¶¶ 39-41 (admitting these facts).

commission of $162,364 to the Stedron account. The commission price had been determined by taking 15% of the purchase price in lire and converting the amount to dollars.[24]

From 1992 to 1995, Steinhardt possessed the Phiale and displayed it in his home.

PROCEDURAL HISTORY

On February 16, 1995, the Italian Government submitted a Letters Rogatory Request to the United States pursuant to the Treaty on Mutual Legal Assistance in Criminal Matters seeking assistance in (1) investigating the circumstances surrounding the exportation from Italy of the Phiale and its subsequent importation into the United States, and (2) confiscating the Phiale so that it could be returned to Italy.

On November 9, 1995, agents of the United States Customs Service, acting pursuant to a seizure warrant issued by Chief Magistrate Judge Naomi Reice Buchwald, seized the Phiale from Steinhardt's home in New York City. Magistrate Judge Buchwald issued the warrant pursuant to 18 U.S.C. § 545 and to 19 U.S.C. § 1595a, finding that the Government had shown probable cause to believe that the Phiale was subject to civil forfeiture.

---

24. March 6, 1992 Fax from Haber to Steinhardt, submitted as Government Exhibit 12; March 11, 1992 Wire Transfer from Steinhardt to Stedron, submitted as Government Exhibit 13; Government Statement at ¶¶ 44, 45; Steinhardt Response at ¶¶ 44, 45 (admitting these facts).

Appendix B

On December 13, 1995, the United States filed the current civil forfeiture action, seeking forfeiture of the Phiale pursuant to 18 U.S.C. §§ 545 and 981(a)(1)(C) and to 19 U.S.C. § 1595a(c). The Government's Complaint, as amended on February 13, 1995, alleged that the Phiale had been imported illegally into the United States due to the materially false statements provided by Haber in the Customs forms relating to the Phiale's country of origin. In addition, the Complaint alleged that the Phiale had been exported illegally from Italy pursuant to Article 44 of Italy's Law of June 1, 1939, No. 1089, regarding the Protection of Objects of Artistic and Historic Interest.[25]

On December 26, 1995, Steinhardt filed the pending motion for summary judgment against the United States in

---

25. The Court has been supplied with a translation of the Italian law as well as an analysis of that law by Avv. Giuliano Berruti, an Italian lawyer and expert on cultural property. *See* Translation of Italy's Law of June 1, 1939, No. 1089, submitted as Government Exhibit 19; March 5, 1996 Affidavit of Giuliano Berruti, submitted as Government Exhibit 16, and May 10, 1996 Affidavit of Giuliano Berruti, submitted as Government Exhibit 1 of the Government's May 16, 1996 Reply Memorandum of Law (hereinafter collectively "Berruti Reports").

Claimant has proffered no expert opinion on Italian law to controvert Berruti's interpretation.

Pursuant to the Italian law, archaeological finds and objects of antiquity belong to the Italian state, unless a party can establish private ownership of the object pursuant to a legitimate title that predates 1902, the year in which the first Italian law protecting antiquities went into effect.

the forfeiture action, claiming that the Phiale is not subject to forfeiture under 18 U.S.C. §§ 545 or 981(a)(1)(C) or under 19 U.S.C. § 1595a(c). Specifically, Steinhardt contends that any alleged misstatements by Haber at the time of the Phiale's importation were not material, as required by the statutes. Steinhardt further asserts that he is an innocent owner as a matter of law under each of the statutes. Finally, Steinhardt argues that forfeiture of the Phiale would violate the Excessive Fines Clause of the Eighth Amendment.

On May 16, 1996, the United States filed its opposition to Steinhardt's motion and cross-moved for summary judgment. The Government argues that: (1) Steinhardt lacks standing to challenge forfeiture of the Phiale because it belongs to Italy; (2) neither 18 U.S.C. § 545 nor 19 U.S.C. § 1595a(c) provides for an "innocent owner defense;" and (3) forfeiture of the Phiale does not violate the Excessive Fines Clause of the Eighth Amendment.

DISCUSSION

I. *The Applicable Standard for Summary Judgment*

Summary judgment is appropriate only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). It is the nonmoving party's burden to "demonstrate to the court the existence of a genuine issue of material fact." *Lendino v. Trans Union Credit Info. Co.*, 970 F.2d 1110, 1112 (2d Cir. 1992). In deciding cross-motions for summary judgment, the Court considers each motion separately, and on each views the facts in the light most favorable to the nonmoving party. *Heublein, Inc. v. United States*, 996 F.2d 1455, 1461 (2d Cir. 1993).

Appendix B

"A fact is material when its resolution would 'affect the outcome of the suit under the governing law,' and a dispute about a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party'." *General Elec. Co. v. New York State Dep't of Labor*, 936 F.2d 1448, 1452 (2d Cir. 1991) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Where undisputed material facts are properly placed before the Court, "those facts will be deemed admitted, unless they are properly controverted by the nonmoving party." *Glazer v. Formica Corp.*, 964 F.2d 149, 154 (2d Cir. 1992).

II. *Standing*

As an initial matter, the Government contends that Steinhardt lacks standing to challenge forfeiture of the Phiale. The Court disagrees.

To establish standing in a civil forfeiture proceeding, a claimant must demonstrate some ownership or possessory interest in the property at issue. *Mercado v. United States Customs Serv.*, 873 F.2d 641, 644 (2d Cir. 1989). A claimant may prove this interest "by actual possession, dominion, control, title, or financial stake." *United States v. Contents of Account Numbers 208-06070 & 208-06068-1-2*, 847 F. Supp. 329, 333 (S.D.N.Y. 1994).

It is undisputed that Steinhardt exercised actual possession, dominion and control over the Phiale from the time he took possession of and displayed it his home in 1992 until it was seized on November 9, 1995. In addition, Steinhardt has a financial stake in the resolution of this civil forfeiture action. As these facts demonstrate sufficient

ownership of or possessory interests in the Phiale, Steinhardt has standing to contest the Government's forfeiture action.

III. *The Relevant Forfeiture Statutes*

The Government seeks civil forfeiture of the Phiale pursuant to 18 U.S.C. §§ 545 and 981(a)(1)(C) and to 19 U.S.C. § 1595a(c).

The Government bears the initial burden of establishing that there is probable cause to believe that the Phiale is subject to forfeiture under any statute. *United States v. Two Parcels of Property Located at 19 & 25 Castle Street*, 31 F.3d 35, 39 (2d Cir. 1994). To meet this burden, the Government must show "reasonable grounds, rising above the level of mere suspicion, to believe that [the] property is subject to forfeiture." *United States v. 15 Black Ledge Drive*, 897 F.2d 97, 101 (2d Cir. 1990). Once the Government has met this burden, the burden of proof shifts to the claimant to show by a preponderance of the evidence that the Phiale is not, in fact, subject to forfeiture. *United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 487 (2d Cir. 1995).

A. *18 U.S.C. § 545*

Section 545 of Title 18 of the United States Code prohibits the importation of merchandise in a manner contrary to law.[26] The Government contends that Haber

---

26. Section 545 provides, in relevant part:

"Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law,

(Cont'd)

violated Section 545 by making materially false statements on the Customs forms in violation of 18 U.S.C. § 542. Specifically, the Government claims that Haber falsely identified the Phiale's country of origin as "CH" or Switzerland, rather than Italy, on the Customs forms.

1. *Importation "Contrary to Law" — Violation of 18 U.S.C. § 542*

Section 542 of Title 18 of the United States Code prohibits the making of false statements on various documents including Customs forms.[27] 18 U.S.C. § 542. For

---

(Cont'd)

> or receives, conceals, buys sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been brought into the United States contrary to law [shall be guilty of a crime.]
>
> . . .
>
> Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States."

18 U.S.C. § 545.

27. Section 542 provides, in relevant part:

> "Whoever enters or introduces . . . into the commerce of the United States any imported merchandise by means

(Cont'd)

purposes of the statute, an allegedly false statement must be material. *See United States v. Holmquist*, 36 F.3d 154, 157 (1st Cir. 1994), *cert. denied*, 514 U.S. 1084 (1995); *United States v. Bagnall*, 907 F.2d 432, 435 (3d Cir. 1990); *United States v. Teraoka*, 669 F.2d 577, 578 (9th Cir. 1982).

The parties disagree, however, over the standard the Court should employ to determine the materiality of Haber's statements on the Customs forms. Steinhardt, citing *Teraoka* and *United States v. Meldish*, 722 F.2d 26 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984), urges the Court to apply a rigid "but for" standard, under which the statements in the Customs forms are not material unless the Government can show that but for those statements the Phiale would not have been permitted into the country.[28]

(Cont'd)

> of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, . . . or makes any false statement in any declaration without reasonable cause to believe the truth of such statement, or procures the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement [shall be guilty of a crime.]"

18 U.S.C. § 542.

28. In an argument that merits little response, Steinhardt claims that listing "CH" on the Customs Forms was not a "misstatement of fact" because Customs also received an invoice describing the Phiale as "one gold bowl — classical" and dating the object as "c. 450 B.C." According to Steinhardt, because there was no Switzerland in 450 B.C., the Customs Service was "on notice as to the true origin of the phiale."

(Cont'd)

Appendix B

The Government, citing *Bagnall* and *Holmquist*, argues that a statement is material "not only if it is calculated to effect the impermissible introduction of ineligible or restricted goods, but also if it affects or facilitates the importation process in any other way." *Bagnall*, 907 F.2d at 436; *see also Holmquist*, 36 F.3d at 159 (holding that false statement is material "if it has the potential significantly to affect the integrity or operation of the importation process as a whole").

The standard proposed by the Government is consistent with the language of the statute, which prohibits importations "by means of" false statements. "By means of" implies that a person has made a false statement at some significant stage in the importation process, not that the importation could not otherwise have been achieved. *See Holmquist*, 36 F.3d at 159 (" 'by means of' [in Section 542] is not synonymous with 'because of' ").

This standard is also consistent with the fundamental purpose of the statute, which is to "ensure full disclosure in importation and thereby maintain the integrity of the importation process as a whole." *Holmquist*, 36 F.3d at 160 (citing *Bagnall*, 907 F.2d at 436). Applying a rigid "but for" standard, as Steinhardt proposes, would thwart this purpose

---

(Cont'd)

This argument is frivolous. The Customs forms required Haber to declare the country of origin of the Phiale. Clearly, an object that has been within the geographic boundary of what is now Italy for over 2000 years, and that was purchased from an Italian dealer in Italy, is "from" Italy. To declare it as being from Switzerland was a misstatement.

by preventing prosecution of many statements that unquestionably are false and deleterious to the importation process, but nonetheless cannot be proven to be the crucial factor in an object's admission through Customs.

Moreover, this standard is consistent with the materiality standard applied in other false-statement contexts. *See, e.g., Kungys v. United States*, 485 U.S. 759, 770-71 (1988) (applying "natural tendency to influence" standard to 8 U.S.C. § 1451(a), denaturalization statute); *United States v. Regan*, 103 F.3d 1072, 1081 (2d Cir.) (applying "natural tendency to influence" standard to 18 U.S.C. § 1623, perjury statute), *cert. denied*, 117 S. Ct. 2484 (1997); *United States v. Ali*, 68 F.3d 1468, 1474-75 (2d Cir. 1995) (applying "natural tendency to influence" standard to 18 U.S.C. § 1001, false statements statute).[29]

Having considered these cases and the parties arguments, the Court determines that the standard for materiality under Section 542 is whether the false statement had a natural tendency to influence the actions or decisions of the Customs Service.[30]

---

29. *See also United States v. Kross*, 14 F.3d 751, 753-54 (2d Cir.) (false statements in civil deposition), *cert. denied*, 513 U.S. 828 (1994); *Pacific Indem. Co. v. Golden*, 985 F.2d 51, 56 (2d Cir. 1993) (false statements in investigation for insurance litigation), *cert. denied*, 469 U.S. 874 (1984)); *United States v. Greenberg*, 735 F.2d 29, 30 (2d Cir. 1984) (false statements in tax returns); *Goodridge v. Harvey Group Inc.*, 728 F. Supp. 275, 281 (S.D.N.Y. 1990) (omissions in Rule 10b-5 shareholder suits).

30. Steinhardt's reliance on *Meldish* does not require a different result. The *Meldish* court did not address the issue of materiality or

(Cont'd)

Applying this materiality standard here, the Court finds that the statements in the Customs forms — misidentifying Switzerland as the country of origin — were materially false and in violation of Section 542.

Customs' procedures provide that the country of origin is a significant factor in determining whether Customs officials should admit an object, hold it for further information, or seize it as smuggled, improperly declared or undervalued. *See* Government Exhibit 20, Customs Directive No. 5230-15. Since certain countries have stringent laws to protect their cultural and artistic heritage, identification of such a country raises a red flag to Customs officials who are reviewing Customs forms. Italy is known to be such a country; Switzerland is not.

Truthful identification of Italy on the customs forms would have placed the Customs Service on notice that an object of antiquity, dated circa 450 B.C., was being exported from a country with strict antiquity-protection laws. This information would have been useful to the agency's determination, and could have prevented Haber from bringing the Phiale into the country illegally. Certainly, such information would have had a tendency to influence the Customs Service's decision-making process and to

---

(Cont'd)
express an intent to adopt the "but for" standard discussed in *Teraoka*. Rather, the court merely cited *Teraoka* as support for a general description of the underlying purpose of Section 542; nothing in that description is incompatible with the materiality standard applied by the Court here.

significantly affect the integrity of the importation process as a whole.

Based on these facts, the Court concludes that the Government has met its burden of establishing that there is probable cause to believe that the Phiale is subject to forfeiture pursuant to 18 U.S.C. § 545 as merchandise imported contrary to law in violation of 18 U.S.C. § 542.

The burden of proof, therefore, shifts to Steinhardt to show by a preponderance of the evidence that the Phiale is not, in fact, subject to forfeiture.

2. *Availability of an Innocent Owner Defense Under 18 U.S.C. § 545*

To meet this burden, Steinhardt argues that even if the Phiale is subject to forfeiture pursuant to 18 U.S.C. § 545, he has a complete defense to forfeiture because he is an innocent owner. The Court disagrees, finding that Section 545 does not afford an innocent owner defense.

Property may be subject to forfeiture regardless of the guilt or innocence of its owner. *See Bennis v. Michigan*, 116 S. Ct. 994, 998-1000 (1996) (noting "well-established authority rejecting the innocent-owner defense"). Where, as here, a statute is silent as to the availability of an innocent owner defense, the Supreme Court has made clear that courts should not read such a defense into the statute. *Id.* at 999-1000.

Section 545 contains no express provision for an innocent owner defense.[31] *Compare* 18 U.S.C. § 981(a)(2) ("No property shall be forfeited under this section to the extent of the interest of an owner or lienholder by reason of any act or omission established by that owner or lienholder to have been committed without the knowledge of that owner or lienholder."). Availability of the defense, therefore, turns on whether there is language in the statute from which to infer such a defense.

Steinhardt claims that the language "recovered from any person" in Section 545 impliedly limits forfeiture to merchandise in the possession of an individual who has violated the statute. A review of the legislative history, however, demonstrates that that language relates only to situations where the merchandise to be seized was lost and the Government now seeks to recover its value. It has no relevance to situations, such as here, where the Government seeks forfeiture of the merchandise itself.

Prior to 1954, the statute read, "[m]erchandise introduced into the United States in violation of this section shall be forfeited to the United States." *See* Act of Sept. 1, 1954,

---

31. The forfeiture provision of section 545 reads as follows:

> "Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States."

18 U.S.C. § 545.

1954 U.S.C.C.A.N. 3900, 3907. A problem arose when the Government sought to claim the value of merchandise that was unavailable for seizure. *See National Atlas Elevator Co. v. United States*, 97 F.2d 940, 944 (8th Cir. 1938) (statute providing "such merchandise shall be forfeited" did not permit Government to retrieve "value of goods which are made subject to forfeiture but which have never been seized"). To address this, Congress amended the statute in 1954 to add the clause "or the value thereof, to be recovered from any person described in the first or second paragraph of this section." *See* Act of Sept. 1, 1954, 1954 U.S.C.C.A.N. 3900, 3907. By this amendment, Congress meant to allow the Government to reach profits from criminal offenders who had already moved their merchandise beyond the Government's reach. The amendment, however, did not modify the first part of the provision dealing with forfeiture of illegal merchandise itself. *Id.* In such cases, the merchandise is still available for forfeiture and the Government need not seek its value.[32]

As such, Section 545 does not permit an innocent owner defense. Because Steinhardt has not produced any other evidence to support his claim, Steinhardt has failed to meet his burden of showing by a preponderance of the evidence

---

32. Steinhardt's reliance on *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), and *United States v. One Tintoretto Painting Entitled "The Holy Family with Saint Catherine and Honored Donor"*, 691 F.2d 603 (2d Cir. 1982), is to no avail. *Tintoretto* relied on dicta from *Calero-Toledo* — the same dicta now used by Steinhardt — which the Supreme Court has since stated should not be relied on to create an innocent owner defense. *Bennis*, 116 S. Ct. at 999.

that the Phiale is not subject to forfeiture pursuant to Section 545. Accordingly, the Government's motion for summary judgment pursuant to 18 U.S.C. § 545 is granted.

B. *19 U.S.C. § 1595a(c)*

As an alternative basis, the Government argues that the Phiale is subject to forfeiture pursuant to 19 U.S.C. § 1595a(c)[33] as stolen property imported contrary to law in violation of 18 U.S.C. § 2314, the National Stolen Property Act.

Section 2314 of Title 18 of the United States Code prohibits the importation of merchandise known to be stolen at the time of import.[34] 18 U.S.C. § 2314. Under Section

---

33. Section 1595a(c) provides, in relevant part:

> "Merchandise which is introduced or attempted to be introduced into the United States contrary to law shall be treated as follows:
>
> (1) The merchandise shall be seized and forfeited if it —
>
> (A) is stolen, smuggled, or clandestinely imported or introduced."

19 U.S.C. § 1595a(c).

34. Section 2314 provides, in relevant part:

> "Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise or

(Cont'd)

2314, an object may be considered "stolen" if a foreign nation has assumed ownership of the object through its artistic and cultural patrimony laws. *United States v. McClain*, 593 F.2d 658, 664-65 (5th Cir.), *cert. denied*, 444 U.S. 918 (1979); *United States v. Hollinshead*, 495 F.2d 1154, 155-56 (9th Cir. 1974).

Issues involving the interpretation of foreign law are determined by the Court as a matter of law. *See* Fed. R. Civ. Proc. 44.1; Fed. R. Crim. Proc. 26.1. Here, having reviewed the relevant Italian law and the submissions of the parties, including the expert opinion of Avv. Giuliano Burruti, *see* Berruti Reports, the Court concludes that the Phiale belongs to Italy pursuant to Article 44 of Italy's law of June 1, 1939, No. 1089. Accordingly, the Court finds that the Phiale is "stolen" within the meaning of Section 2314.

Next, the Court considers whether the Government has shown probable cause to believe that Haber knew the Phiale was stolen at the time he imported it.

In November, 1991, Haber traveled to Sicily to meet Veres and to see the Phiale in person. Sometime later, he told Steinhardt that the Phiale was the twin of one belonging to the Metropolitan Museum of Art, and that its seller was a Sicilian coin dealer.

(Cont'd)

> money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud [shall be guilty of a crime]."

18 U.S.C. § 2314.

Appendix B

In negotiating for the Phiale on behalf of Steinhardt, Haber provided for a full refund if the Phiale was seized by Customs or claimed by a country or governmental agency. He also inserted a provision in the Terms of Sale that Dr. Manganaro would write a letter certifying that he saw the Phiale fifteen years ago in Switzerland. In fact, Dr. Manganaro claims to have never agreed to write this letter.

To acquire the Phiale, Haber took great effort to ensure that the Phiale was not exported directly from Italy. After arriving in Zurich, Haber traveled across the Swiss Alps to Lugano, a town near the Swiss-Italian border that is about a three-hour car drive from Zurich. There, he took possession of the Phiale and received a commercial invoice dating the Phiale as circa 450 B.C. Haber then traveled back to Zurich, rather than to a closer Italian city such as Milan, to fly back to New York.

Upon entry to the United States, Haber, assisted by his customs broker, succeeded in importing the Phiale through the use of two materially false Customs forms.

Finally, following seizure of the Phiale and commencement of the current action, Haber invoked the Fifth Amendment at a deposition and refused to answer any questions regarding the Phiale's purchase or importation. *See* Haber Deposition. From this fact, the Court can draw an adverse inference against Haber that he knew the Phiale was stolen at the time he imported it. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *Brink's Inc. v. City of New York*, 717 F.2d 700, 709 (2d Cir. 1983).

Based on these undisputed facts, the Court finds probable cause to believe that Haber knew the Phiale was stolen when he imported it. Accordingly, the Government has met its burden of showing that the Phiale is subject to forfeiture pursuant to 19 U.S.C. § 1595a(c), as stolen merchandise imported in violation of 18 U.S.C. § 2314.

Against this finding of probable cause, Steinhardt offers no facts to suggest that the Phiale is not, in fact, subject to forfeiture. Moreover, Section 1595a(c) does not provide for an innocent owner defense. *See Bennis*, 116 S. Ct. at 999-1000.

The Government's motion for summary judgment pursuant to 19 U.S.C. § 1595a(c) is granted.[35]

IV. *Eighth Amendment*

Steinhardt's final argument is that forfeiture of the Phiale violates the Excessive Fines Clause of the Eighth Amendment. The Court disagrees.

The Eighth Amendment applies to civil *in rem* forfeitures only where the forfeiture constitutes punishment in some part. *Austin v. United States*, 509 U.S. 602, 610 (1993). Where the seized goods are contraband, however, forfeiture may be characterized as remedial because it removes dangerous or illegal items from society. *Austin*, 509 U.S. at 621 (citing *United States v. One Assortment of 89 Firearms*,

---

35. In view of the Court's findings with respect to 18 U.S.C. § 545 and 19 U.S.C. § 1595a(c), the Court need not reach Steinhardt's motion for summary judgment pursuant to 18 U.S.C. § 981(a)(1)(C).

465 U.S. 354, 364 (1984) (holding that forfeiture of contraband is remedial sanction that does not constitute punishment for double jeopardy purposes)).[36]

Goods such as the Phiale imported in violation of customs laws are contraband. *See Bennis*, 116 S. Ct. at 1004 (Stevens, J., dissenting) (characterizing smuggled goods as "pure contraband"). Forfeiture of these goods serves remedial rather than punitive purposes because it prevents forbidden merchandise from circulating in the United States and reimburses the Government for investigation and enforcement expenses. *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972).[37]

Accordingly, forfeiture of the Phiale — contraband imported in violation of the customs laws — is remedial and does not constitute "punishment" implicating the Eighth Amendment.[38] *See United States v. $50,000 in United States*

---

36. *See also Bennis*, 116 S. Ct. at 1004 (Stevens, J., dissenting) (noting that forfeiture of "pure contraband" serves "obvious remedial" purpose of removing illegal items from private circulation).

37. *See also United States v. Proceeds From Sale of Approximately 15,538 Panulirus Argus Lobster Tails*, 834 F. Supp. 385, 391 (S.D. Fla. 1993) (forfeiture of lobster tails imported in violation of Lacey Act, 16 U.S.C. § 3371 *et seq.*, characterized as purely remedial because tails were contraband).

38. In this connection, the Phiale is not the proceeds of a crime and is more than the instrumentality of a crime. It is, rather, the precise substance of the unlawful act. As such, Steinhardt's reliance on cases in which the Government seized proceeds from or

(Cont'd)

Currency, 93 Civ. 3874, 1994 WL 75145 (N.D. Ill. March 9, 1994) (holding that Eighth Amendment is not implicated in forfeiture of money transported in violation of reporting requirements of 31 U.S.C. § 5317).

Even if the Eighth Amendment were implicated, the Court finds that forfeiture of the Phiale would not be unconstitutional. In determining the excessiveness of a forfeiture, the Court considers (1) the harshness of the forfeiture (the nature and value of the property and the effect of forfeiture on innocent third paries) in comparison to the gravity of the offense and the sentence that could be imposed on the perpetrator of such an offense; (2) the relationship between the property and the offense; and (3) the role and degree of culpability of the owner of the property. *United States v. Milbrand.*, 58 F.3d 841, 847-48 (2d Cir. 1995).

Here, forfeiture of the Phiale is not particularly "harsh." Pursuant to the Terms of Sale, Steinhardt is entitled to a full refund of the purchase price because the Phiale was seized and claimed by both a governmental agency and country.[39]

(Cont'd)
instrumentalities of a crime is misplaced. *See, e.g., United States v. Van Brocklin*, 115 F.3d 587, 601-02 (8th Cir. 1997) (fine and forfeiture of proceeds in bank fraud scheme); *United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483 (2d Cir. 1995) (forfeiture of car lot used to sell stolen car parts); *United States v. Milbrand*, 58 F.3d 841 (2d Cir. 1995) (forfeiture of land used as instrumentality in marijuana production), *cert. denied*, 116 S. Ct. 1284 (1996).

39. Insofar as Steinhardt is innocent of any wrongdoing, his dispute should be with Haber or Veres and not with the Governments of the United States or Italy.

At the same time, the offense at issue here is grave; it involves the trafficking of a cultural antiquity by means of false statements.

Second, as Steinhardt concedes, the property and offense are coextensive.

Third, the extent of Steinhardt's culpability is unclear. Steinhardt's experience as an art collector (and specifically his experience with Haber) and the fact that, in the purchase agreement, he provided for the risk of seizure that eventually occurred, both detract from his claim of innocence. Even assuming that he is an innocent owner, however, the Court finds that this third factor is outweighed by the first and second factors.

Accordingly, the Court finds that forfeiture of the Phiale is not unconstitutionally excessive and does not violate Steinhardt's rights, if any, under the Eighth Amendment.

CONCLUSION

For the reasons stated above, the Government's motion for summary judgment pursuant to 18 U.S.C. § 545 and to 19 U.S.C. § 1595a(c) is granted.

The clerk is directed to enter judgment.

Appendix B

SO ORDERED:

s/ Barbara S. Jones
BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Dated: White Plains, New York
November 14, 1997

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AND FILED NOVEMBER 17, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

95 CIVIL 10537 (BSJ)

UNITED STATES OF AMERICA,

Plaintiff,

– against –

AN ANTIQUE PLATTER OF GOLD, KNOWN AS A GOLD PHIALE MESOMPHALOS, C. 400 B.C.,

Defendant-in rem.

MICHAEL H. STEINHARDT,

Claimant.

REPUBLIC OF ITALY,

Claimant.

JUDGMENT

Whereas the above entitled action having been assigned to the Honorable Barbara S. Jones, U.S.D.J., and the Court thereafter on November 14, 1997 having handed down its

Appendix C

Memorandum & Order granting plaintiff's motion for summary judgment pursuant to 18 U.S.C. § 545 and to 19 U.S.C. § 1595a(c); it is,

ORDERED, ADJUDGED AND DECREED: That plaintiff's motion for summary judgment is granted pursuant to 18 U.S.C. § 545 and to 19 U.S.C. § 1595a(c).

Dated: White Plains, New York
November 17, 1997

s/ James M. Parkison
Clerk

APPENDIX D — RELEVANT STATUTES

18 U.S.C. § 542

§ 542. Entry of goods by means of false statements

Whoever enters or introduces, or attempts to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance, or makes any false statement in any declaration without reasonable cause to believe the truth of such statement, or procures the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement, whether or not the United States shall or may be deprived of any lawful duties; or

Whoever is guilty of any willful act or omission whereby the United States shall or may be deprived of any lawful duties accruing upon merchandise embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement, or affected by such act or omission —

Shall be fined for each offense under this title or imprisoned not more than two years, or both.

Nothing in this section shall be construed to relieve imported merchandise from forfeiture under other provisions of law.

The term "commerce of the United States", as used in this section, shall not include commerce with Virgin Islands,

Appendix D

American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam.

* * *

18 U.S.C. § 545

§ 545. Smuggling goods into the United States

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces or attempts to smuggle or clandestinely introduce into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law —

Shall be fined under this title or imprisoned not more than five years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Appendix D

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States.

The term "United States", as used in this section, shall not include Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam.

* * * *

APPENDIX E — FIFTH AMENDMENT

AMENDMENT V — GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * *

APPENDIX F — EIGHTH AMENDMENT

AMENDMENT VIII — EXCESSIVE BAIL, FINES, PUNISHMENTS

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

* * * *

Supreme Court, U.S.
FILED
DEC 13 1999
CLERK

(2)

No. 99-641

In the Supreme Court of the United States

MICHAEL H. STEINHARDT, PETITIONER

v.

UNITED STATES OF AMERICA
AND REPUBLIC OF ITALY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
JAMES K. ROBINSON
Assistant Attorney General
DANIEL S. GOODMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

34 pp

QUESTIONS PRESENTED

1. Whether the lower courts applied the proper test for materiality in determining that the Customs forms filed in connection with the importation of the defendant artifact contained materially false statements.

2. Whether petitioner was an innocent owner of the defendant artifact, and, if so, whether its forfeiture violated petitioner's due process rights.

3. Whether the forfeiture of the defendant artifact under the Customs laws violated the Excessive Fines Clause of the Eighth Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Austin v. *United States*, 509 U.S. 602 (1993)	16, 17
Bennis v. *Michigan*, 516 U.S. 442 (1996)	6, 15
Calero-Toledo v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974)	15
Kungys v. *United States*, 485 U.S. 759 (1988)	8, 12
Neder v. *United States*, 119 S. Ct. 1827 (1999)	8, 12
One Lot Emerald Cut Stones v. *United States*, 409 U.S. 232 (1972)	17
One 1995 Toyota Pick-Up Truck v. *District of Columbia*, 718 A.2d 558 (D.C. 1998)	19
United States v. *Bagnall*, 907 F.2d 432 (3d Cir. 1990)	8, 11
United States v. *Bajakajian*, 524 U.S. 321 (1998)	6, 16, 17, 19
United States v. *Corcuera-Valor*, 910 F.2d 198 (5th Cir. 1990)	8, 9, 10
United States v. *817 N.E. 29th Drive, Wilton Manors*, 175 F.3d 1304 (11th Cir. 1999), petition for cert. pending No. 99-6374	16, 18
United States v. *Gaudin*, 515 U.S. 506 (1995)	8, 12
United States v. *Holmquist*, 36 F.3d 154 (1st Cir. 1994), cert. denied, 514 U.S. 1084 (1995)	7-8, 11
United States v. *Real Property Known as 415 East Mitchell Avenue*, 149 F.3d 472 (6th Cir. 1998)	16-17, 18

Cases—Continued: Page

United States v. *Rose*, 570 F.2d 1358 (9th Cir. 1978) 12
United States v. *Steinfels*, 753 F.2d 373 (5th Cir. 1985) 12
United States v. *Teraoka*, 669 F.2d 577 (9th Cir. 1982) 8, 9, 10
United States v. *3814 NW Thurman Street*, 164 F.3d 1191, amended, 172 F.3d 689 (9th Cir. 1999) 16, 19
United States v. *Ven-Fuel, Inc.*, 602 F.2d 747 (5th Cir. 1979), cert. denied, 447 U.S. 905 (1980) 10
Yskamp v. *Drug Enforcement Admin.*, 163 F.3d 767 (3d Cir. 1998) 16, 18

Constitution and statutes:

U.S. Const.:
Amend. V 5
Amend. VIII (Excessive Fines Clause) 5, 7, 11, 16, 17, 18, 19
8 U.S.C. 1451(a) 8
18 U.S.C. 542 ..... 3, 4, 7, 8, 11, 12, 13, 14, 15, 17
18 U.S.C. 545 ..... 2, 3, 4
18 U.S.C. 981(a)(1)(C) 3
18 U.S.C. 982(a)(1) 17
18 U.S.C. 1001 8
19 U.S.C. 1595a(c) 2, 3, 5
21 U.S.C. 881 ..... 17, 18

Miscellaneous:

Webster's Third New International Dictionary (3d ed. 1986) 13

In the Supreme Court of the United States

No. 98-641

MICHAEL H. STEINHARDT, PETITIONER

v.

UNITED STATES OF AMERICA
AND REPUBLIC OF ITALY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 184 F.3d 131. The opinion of the district court (Pet. App. 21a-49a) is reported at 991 F. Supp. 222.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1999. The petition for a writ of certiorari was filed on October 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In this civil *in rem* proceeding, the United States sought the forfeiture of an antique gold platter known

as a Phiale pursuant to 18 U.S.C. 545 and 19 U.S.C. 1595a(c). Pet. App. 5a. The district court granted the government's motion for summary judgment and ordered the Phiale forfeited. Pet. App. 21a-51a. The court of appeals affirmed. Pet. App. 1a-20a.

1. The defendant Phiale is of Sicilian origin and dates from the 4th Century B.C. Pet. App. 3a. In 1991, William Veres, a Swiss art dealer, obtained the Phiale from a Sicilian coin dealer in exchange for goods worth approximately $90,000. *Ibid.* Veres then brought the Phiale to the attention of Robert Haber, a New York art dealer who had previously sold many expensive objects to petitioner. *Id.* at 3a, 24a-25a. In November 1991, Haber traveled to Sicily to examine the Phiale. *Id.* at 3a. Acting on petitioner's behalf, Haber agreed to purchase the Phiale for slightly more than $1 million. *Ibid.* In the Terms of Sale, Haber and Veres agreed that "[i]f the object is confiscated or impounded by customs agents or a claim is made by any country or governmental agency whatsoever, full compensation will be made immediately to the purchaser." *Id.* at 4a. On December 6, 1991, petitioner wired the first installment of the purchase price to Veres. *Id.* at 26a.

On December 10, 1991, Haber flew from New York to Zurich, Switzerland. Pet. App. 4a. From Zurich, Haber proceeded to a Swiss town near the Italian border, where he took possession of the Phiale. *Ibid.* Haber's customs broker in New York prepared Customs forms for the Phiale. The forms listed Switzerland, not Italy, as the Phiale's country of origin; and it listed $250,000, rather than the more than $1 million petitioner had paid, as the Phiale's value. *Id.* at 4a-5a. Haber then returned from Zurich to the United States with the Phiale, eventually presenting it to petitioner. *Id.* at 5a. After the Metropolitan Museum of Art examined the

Phiale and determined that it was authentic, petitioner wired the remainder of the purchase price to Veres' account; he also wired a 15% commission to Haber. *Id.* at 5a, 28a-29a. From 1992 through 1995, petitioner displayed the Phiale in his home. *Id.* at 5a.

2. On February 16, 1995, the Italian Government submitted a Letters Rogatory Request to the United States seeking assistance in investigating the importation of the Phiale into the United States and in obtaining its return to Italy. Pet. App. 5a, 29a. A United States Magistrate Judge found probable cause to believe that the Phiale was subject to civil forfeiture and issued a seizure warrant. *Ibid.* Acting pursuant to that warrant, on November 9, 1995, United States Customs Service agents seized the Phiale from petitioner's home. *Ibid.*

On December 13, 1995, the United States filed a civil forfeiture action seeking forfeiture of the Phiale pursuant to 18 U.S.C. 545 and 981(a)(1)(C) and 19 U.S.C. 1595a(c). Pet. App. 5a, 30a. The complaint, as amended on February 13, 1996, alleged that the Phiale had been imported into the United States in violation of 18 U.S.C. 542 because of materially false statements on the Customs forms. Pet. App. 30a.[1] In addition, the complaint alleged that the Phiale had been exported from Italy in violation of an Italian law establishing a presumption that an archaeological item belongs to the state absent proof that the item was privately owned before 1902. *Id.* at 5a, 30a.

Petitioner entered the forfeiture proceeding as a claimant, and the parties filed cross motions for sum-

---

[1] The district court's opinion mistakenly refers to the date of the First Amended Complaint as February 13, 1995, rather than February 13, 1996. Pet. App. 30a.

mary judgment. Pet. App. 6a, 30a-31a, 33a-34a. In a Memorandum and Order dated November 14, 1997, the district court granted summary judgment to the United States. *Id.* at 21a-49a. The court agreed that Haber, by identifying Switzerland as the country of origin of the Phiale, had made a materially false statement on the Customs forms, in violation of 18 U.S.C. 542, and that the Phiale was therefore subject to forfeiture under 18 U.S.C. 545. Pet. App. 33a-39a. In reaching that determination, the court employed the standard of materiality advocated by the government, *i.e.*, that the false statement had a "natural tendency" to influence Customs officials, rather than the "rigid 'but for' standard" advanced by petitioner. *Id.* at 35a-39a. The court explained that the "natural tendency" standard "is consistent with the language of the statute, which prohibits importations 'by means of' false statements," and is "also consistent with the fundamental purpose of the statute," which is to maintain the integrity of the importation process by ensuring full disclosure. *Id.* at 36a. The court added that "[t]ruthful identification of Italy on the customs forms would have placed the Customs Service on notice that an object of antiquity * * * was being exported from a country with strict antiquity-protection laws." *Id.* at 38a. That information, the court continued, would "have had a tendency to influence the Customs Service's decision-making process and to significantly affect the integrity of the importation process as a whole." *Id.* at 38a-39a.

The district court also rejected petitioner's claim that he had a defense to forfeiture as an "innocent owner." Pet. App. 39a-42a. "Section 545," the district court concluded, "does not permit an innocent owner defense." *Id.* at 39a. The court therefore granted the govern-

ment's motion for summary judgment under Section 545. *Id.* at 48a.

As an alternative basis for its ruling, the district court concluded that the Phiale was subject to forfeiture under 19 U.S.C. 1595a(c). Pet. App. 42a-45a. Noting both that "Haber took great effort to ensure that the Phiale was not exported directly from Italy" and that Haber "invoked the Fifth Amendment at a deposition and refused to answer any questions regarding the Phiale's purchase or importation," the court found "probable cause to believe that Haber knew the Phiale was stolen when he imported it." *Id.* at 44a-45a. The court also concluded that Section 1595a(c) does not provide an "innocent owner" defense. *Id.* at 45a.

Finally, the district court rejected petitioner's argument that forfeiture of the Phiale was an excessive fine under the Eighth Amendment. Pet. App. 45a-48a. The court explained that forfeiture of goods imported in violation of the customs laws "serves remedial rather than punitive purposes because it prevents forbidden merchandise from circulating in the United States and reimburses the Government for investigation and enforcement expenses." *Id.* at 46a. Moreover, the court determined that, even if the Eighth Amendment "were implicated" in this case, forfeiture of the Phiale would not be particularly harsh, because petitioner would be "entitled to a full refund of the purchase price" under the Terms of Sale. *Id.* at 47a. In contrast, the court found, "the offense at issue here is grave," because "it involves the trafficking of a cultural antiquity by means of false statements." *Id.* at 48a. The court also noted that "the extent of [petitioner's] culpability is unclear," explaining that his "experience as an art collector" and his provision "for the risk of seizure that eventually

occurred[] both detract from his claim of innocence." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-20a. It agreed with the district court that "importation of the Phiale violated [Section] 545 because of the false statements on the customs forms." *Id.* at 6a. In particular, the court of appeals explained, "the designation of Switzerland as the Phiale's country of origin and the listing of its value of $250,000 were false." *Id.* at 8a. The court of appeals further held that, while "Section 542 does include a materiality requirement," *ibid.*, the "natural tendency" test adopted by the district court, rather than petitioner's "but for" test, was the proper test for materiality. *Id.* at 9a-12a.

The court of appeals then rejected petitioner's argument that "even under a natural tendency test" the misstatements on the Customs forms were not material. Pet. App. 12a. The court explained that Customs officials are directed to determine whether imported property is subject to a claim of foreign ownership, and "[a]n item's country of origin is clearly relevant to that inquiry." *Id.* at 12a-13a. According to the court of appeals, "a reasonable customs official would certainly consider" the possibility that the Phiale had "been exported in violation of Italian patrimony laws," and thus the fact that the Phiale was from Italy "would * * * be of critical importance" in deciding whether to seize the Phiale. *Id.* at 13a.

The court of appeals also rejected petitioner's "innocent owner" defense. Pet. App. 16a-17a. It relied on this Court's decisions in *Bennis* v. *Michigan*, 516 U.S. 442 (1996), which "traced the long history of forfeiture laws that did not provide for such a defense," and *United States* v. *Bajakajian*, 524 U.S. 321 (1998), which

reaffirmed the historical irrelevance of innocence of the owner in forfeiture law. Pet. App. 17a.

Finally, the court of appeals rejected petitioner's Eighth Amendment claim. It distinguished *Bajakajian* on the grounds that "the forfeiture here was not part of a criminal prosecution," Pet. App. 18a, and that "Section 545 is a customs law, traditionally viewed as nonpunitive." *Id.* at 19a. The court of appeals thus concluded that the Phiale was "classic contraband, an item imported into the United States in violation of law," the forfeiture of which is "nonpunitive and outside the scope of the Excessive Fines Clause." *Id.* at 19a-20a.

ARGUMENT

1. Petitioner first contends (Pet. 8-14) that there is a division of appellate authority concerning the proper standard of materiality under 18 U.S.C. 542. Although there is language in cases from other circuits that could be read to support the view that "[t]he circuits are divided as to the proper test," Pet. App. 9a, the facts of the decided cases indicate that any such disagreement that presently exists is of uncertain scope and its resolution would not assist petitioner in any event. Accordingly, further review is not warranted.

a. As petitioner (Pet. 9, 10-11) and the court of appeals (Pet. App. 9a) both note, the First and Third Circuits, like the court of appeals here, have indicated that a false statement is material under Section 542 if it has a "natural tendency to influence" customs officials or the customs and importation process—that is, if "a reasonable customs official would consider the statements to be significant to the exercise of his or her official duties." Pet. App. 10a, 11-12a (internal quotation marks omitted). See *United States* v. *Holmquist*, 36 F.3d 154, 159 (1st Cir. 1994) ("a false statement is

material under section 542 if it has the potential significantly to affect the integrity or operation of the importation process as a whole," without regard to "actual causation" or "actual harm"), cert. denied, 514 U.S. 1084 (1995); *United States* v. *Bagnall*, 907 F.2d 432, 436 (3d Cir. 1990) (expressing view that a false statement under Section 542 is material "not only if it is calculated to effect the impermissible introduction of ineligible or restricted goods, but also if it affects or facilitates the importation process in any other way"). That position is consistent with this Court's view that the materiality of a false statement is generally determined by the "natural tendency" test. *Neder* v. *United States*, 119 S. Ct. 1827, 1837 (1999) ("[i]n general," the materiality of a false statement is determined by the "natural tendency" test); *United States* v. *Gaudin*, 515 U.S. 506, 509 (1995) (applying the "natural tendency" test of materiality to false statements under 18 U.S.C. 1001); *Kungys* v. *United States*, 485 U.S. 759, 770 (1988) (in prosecution under 8 U.S.C. 1451(a), stating that a "misrepresentation is material if it 'has a natural tendency to influence, or was capable of influencing, the decision of' the decisionmaking body to which it was addressed").

Petitioner, however, contends that the decision in this case (and those of the First and Third Circuits) conflicts with *United States* v. *Teraoka*, 669 F.2d 577, 579 n.3 (9th Cir. 1982), and *United States* v. *Corcuera-Valor*, 910 F.2d 198, 199 (5th Cir. 1990). In particular, petitioner contends that the Fifth and Ninth Circuits require proof that, but for the false statement, the importation would not have occurred. See Pet. 9 (describing those cases as holding that "a 'but for' test is the more appropriate standard" for determining materiality); Pet. 11 (statute's use of the words "by means of"

"clearly supports the conclusion that the government must demonstrate that the false statement actually caused the importation of the goods into the country."); Pet. App. 9a (Petitioner "argues for a 'but for' test of materiality, *i.e.*, a false statement is material only if a truthful answer on a customs form would have actually prevented the item from entering the United States.").

Both *Teraoka* and *Corcuera-Valor*, however, involved false pricing information that did not even have the *potential*—much less a natural tendency—to affect whether or not importation would have occurred. See *Teraoka*, 669 F.2d at 579; *Corcuera-Valor*, 910 F.2d at 200. Thus, on the facts of those cases, the defect was not the absence of but-for causation. It was, as the courts of appeals in those cases explained, the absence of *any* "relationship" or "logical nexus" between the false statement and actual importation. See *Teraoka*, 669 F.2d at 579 & n.3 (prosecution had not met its burden because it had not shown that "the false statements * * * had *some relationship* to the actual importation of the goods in the country") (emphasis added); *Corcuera-Valor*, 910 F.2d at 200 (government had not shown some "logical nexus" between the false statements and "the actual importation" of merchandise).[2] Thus neither court was required to decide the nature or degree of logical relationship and nexus that the government is required to prove.

Here, in contrast, there was no want of logical relationship or nexus, and both the district court and court

---

[2] As the court of appeals explained in *Corcuera-Valor*, the defendants were permitted "to import their shirts regardless of the price on the invoice" and even truthful information would not affect "the ability of the defendants to import these particular goods." 910 F.2d at 200.

of appeals found a strong relationship between the importation of the Phiale and the false statements regarding country of origin. As the court of appeals explained, official Customs policy requires officers to determine whether property being imported is "subject to a claim of foreign ownership" and to seize property subject to such claims. Pet. App. 13a. Because the Customs Service considers "violations of a nation's patrimony laws" enforceable under that policy, the facts that the Phiale was not only very valuable but also from Italy—a country with very strict patrimony laws respecting archaeological artifacts—"would [have been] of critical importance" to any reasonable customs official. *Ibid.* See also *id.* at 38a-39a (Because "[t]ruthful identification of Italy on the customs forms would have placed the Customs Service on notice that an object of antiquity * * * was being exported from a country with strict antiquity-protection laws," the information would "have had a tendency to influence the Customs Service's decision-making process and to significantly affect the integrity of the importation process as a whole."). Despite some language in *Teraoka*, 509 F.2d at 579, and *Corcuera-Valor*, 910 F.2d at 199-200, that swept more broadly, neither case ruled out the sufficiency of proof of that character to establish the required nexus.[3]

---

[3] The Fifth Circuit's earlier decision in *United States* v. *Ven-Fuel, Inc.*, 602 F.2d 747, 753 (1979), cert. denied, 447 U.S. 905 (1980), upon which *Corcuera-Valor* relied, is similarly distinguishable. There the court of appeals recognized that materiality depends on "a reasonable showing of the *potential effects* of the statement," but held that the false statement there was not material because it had "no significance whatsoever with respect to the actual importation"; there was, in other words, "no logical nexus"

To be sure, there is one sense in which *Teraoka* and *Corcuera-Valor* may differ from *Holmquist*, 36 F.3d at 154, *Bagnall*, 907 F.2d at 436, and the decision below, Pet. App. 11a, but it is not one that would alter the result in this case. *Teraoka* and *Corcuera-Valor* both appear to indicate that Section 542 requires not only that the false statement be material, but also that it be material *to the customs official's decision on whether to permit importation.* See p. 9, *supra.* The decisions in this case, in *Holmquist*, and in *Bagnall*, by contrast, all suggest that the false statement or document need be material only in a more generalized sense, *i.e.*, the statement or document is material if it has the potential significantly to affect the importation process or Customs Service operations (such as where it might reasonably prevent Customs from imposing an otherwise appropriate duty on the item), even if it could not affect whether or not the item would actually be admitted into the country.[4]

That difference, however, may not represent a true circuit conflict, as earlier decisions from the Fifth and Ninth Circuits, contrary to *Teraoka* and *Corcuera-Valor*, uphold convictions under Section 542 even where the false statements only had the potential to affect the importation process (such as applicable tariffs) and not

---

between the false statement and the likelihood that the merchandise would be admitted. *Ibid.* (emphasis added).

[4] *Holmquist*, 36 F.3d at 159 ("a false statement is material under section 542 if it has the potential significantly to affect the integrity or operation of the importation process as a whole"); Pet. App. 11a (same); *Bagnall*, 907 F.2d at 436 (false statement under Section 542 is material "not only if it is calculated to effect the impermissible introduction of ineligible or restricted goods, but also if it affects or facilitates the importation process in any other way").

whether importation would actually occur.[5] But to the extent such a conflict might exist, it is not implicated here. In this case, both the district court and the court of appeals specifically found that the false statements had a natural tendency to affect not only the importation process as a general matter but also whether the Phiale would have been admitted at all. See pp. 9-10, *supra*. Consequently, the false statements would have been material even if materiality *to importation* were required, as under *Teraoka* and *Corcuera-Valor*.

Finally, since *Teraoka* and *Corcuera-Valor* were decided, this Court has espoused a "natural tendency" test for materiality under a number of statutory schemes, and has stated that the "natural tendency" test generally governs questions of materiality. See p. 8, *supra* (citing *Neder*, 119 S. Ct. at 1827; *Gaudin*, 515 U.S. at 509; and *Kungys*, 485 U.S. at 770). In fact, all of the Section 542 cases petitioner (Pet. 9-10) and the court of appeals (Pet. App. 9a) describe as having adopted petitioner's but-for causation test pre-date those decisions, with the exception of *Corcuera-Valor*; and *Corcuera-Valor* pre-dates all of those decisions but *Kungys*. Moreover, the Ninth Circuit has not relied on *Teraoka* since it was decided in 1982, and the Fifth Circuit has not relied on *Corcuera-Valor* since it was decided in 1990. Accordingly, it is entirely possible

---

[5] *United States* v. *Steinfels*, 753 F.2d 373 (5th Cir. 1985) (holding that false statement that imported automobiles were for personal use and thus exempt from customs duties "effected the duty-free entry of the cars" and thus supported conviction for introducing imported automobiles "by means of false statements"); *United States* v. *Rose*, 570 F.2d 1358 (9th Cir. 1978) (upholding conviction based on fraudulent failure to list goods on customs declaration, even though the goods would have been admissible had they been declared).

that, even if those decisions could be read as requiring proof of but-for causation, the Fifth and Ninth Circuits would feel free to reconsider them and select the "natural tendency" test repeatedly endorsed by this Court since those cases were decided. See also pp. 11-12, *supra* (noting that *Teraoka* and *Corcuera-Valor* conflict with prior Fifth and Ninth Circuits decisions).[6]

b. The standard of materiality adopted by the court of appeals in this case was in any event correct. As explained above (p. 8, *supra*), this Court has repeatedly endorsed the "natural tendency" test as the ordinary measure for determining materiality. Petitioner does not contend otherwise. Petitioner, however, argues that Section 542 must contemplate a "but-for" standard for materiality because Section 542 applies only when the defendant imports or attempts to import merchandise "by means of" the false statement. That reasoning is not correct.

Petitioner errs in assuming that the phrase "by means of" is properly understood as imposing a requirement of but-for causation. The phrase "by means of" connotes not that the government must prove that, but for the false statement, the good would not have been imported; rather, it connotes assistance, use and employment, as well as instrumentality and agency.[7] As a result, one who employs a false statement as an instrument in importing merchandise has violated the

---

[6] The fact that this issue has not arisen with more frequency belies petitioner's contention (Pet. 8) that the proper test for materiality under Section 542 is an important issue that presently requires this Court's attention.

[7] See *Webster's Third New International Dictionary* 307 (3d ed. 1986) (defining "by means of" as "through the agency or instrumentality of"); *id.* at 2384 (defining "through" as "by means of" and equivalently "by the help or agency of").

statute by importing goods "by means of" the false statement.[8] Even if the same merchandise also could have been imported using a true statement—*i.e.*, the goods could have been imported "by means of" the truth—that would not alter the fact that the defendant conducted the importation by means of false statements. Indeed, that should be especially apparent given that the statute extends not only to false statements but also to any false or fraudulent "invoice, declaration, affidavit, letter, [or] paper." 18 U.S.C. 542. One who uses a falsified or fraudulent document in importing merchandise imports the item "by means of" the false document within the ordinary meaning of that phrase, even when it might also have been possible to import the item "by means of" a true document.

Finally, petitioner's contention that Section 542 applies only to false statements that result in the entry of otherwise non-importable merchandise would impose an extraordinary and unusual burden on the government—the burden of proving what *might have been* ("what would have happened if a truthful statement had been made," Pet. App. 11a)—and is difficult to reconcile with the remainder of Section 542's language. The first paragraph of Section 542 prohibits the actual or attempted importation of merchandise by means of fraudulent or false documents or statements "whether or not the United States shall or may be deprived of any lawful duties." 18 U.S.C. 542. Lawful duties can be owed only on merchandise that would not, if truthfully described, be barred from entry. The statutory reference to duties potentially owed in connection with the

---

[8] The materiality requirement then applies to ensure that the nature of the false statement is sufficiently important to warrant prohibition.

goods introduced "by means of" false statements or documents thus indicates that the provision is not limited to fraudulent introduction of merchandise that would not otherwise have been admitted.[9]

2. Petitioner next contends (Pet. 14-18) that the court of appeals' decision that the forfeiture of the Phiale did not violate his due process rights "conflicts with decisions of this Court relating to the due process protections applicable to forfeiture statutes." Pet. 14. No such conflict exists.

Petitioner appears to rely primarily on the statement in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 (1974), that "it would be difficult to reject the constitutional claim of * * * an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property." Pet. 15. As the court of appeals correctly noted (Pet. App. 17a), this Court in *Bennis* v. *Michigan*, 516 U.S. 442, 450 (1996), labeled that statement "*obiter dictum*," and declined to apply it, even when the petitioner lacked knowledge that the forfeited property had been an instrumentality of illegal activity.

Petitioner attempts (Pet. 15-18) to distinguish *Bennis* by noting that, in *Bennis*, the forfeiture had an effect on the wrongdoer; here, he contends, "the full effect of this

---

[9] Petitioner's construction is also difficult to reconcile with the fact that Section 542 criminalizes "attempts" to import merchandise "by means of" false statements. See 18 U.S.C. 542 (offense committed by whoever "enters or introduces, or attempts to enter or introduce * * * merchandise by means of" falsity). If materiality required a showing that, "but for" the false statement, the merchandise would not have entered the country, then it arguably would not be possible to prosecute attempts to import the goods when the goods are seized before entry.

forfeiture will fall solely on [petitioner], who is not alleged to have committed any wrongdoing." Pet. 17.[10] *Bennis* did not draw that distinction, but even if *Bennis* could be so distinguished, petitioner is factually incorrect to assert that he alone will bear the loss associated with the forfeiture here. The Terms of Sale for the Phiale specifically address the risk of forfeiture, see Pet. App. 4a, 47a; p. 2, *supra*, and petitioner therefore may be entitled recover his losses from the sellers, including Haber (upon whom petitioner places primary responsibility). Moreover, it is not clear that petitioner was wholly innocent. As the district court explained, there was evidence that suggested petitioner's "culpability" and tended to "detract from his claim of innocence." Pet. App. 48a.

3. Finally, petitioner contends (Pet. 18-24) that the forfeiture of the Phiale is an "excessive fine" under the Eighth Amendment. He maintains (Pet. 18-19) that the court of appeals' decision conflicts with this Court's decisions in *United States* v. *Bajakajian*, 524 U.S. 321 (1998), and *Austin* v. *United States*, 509 U.S. 602 (1993), as well as with several post-*Bajakajian* decisions of the courts of appeals, including *United States* v. *817 N.E. 29th Drive, Wilton Manors*, 175 F.3d 1304 (11th Cir. 1999), petition for cert. pending, No. 99-6374 (filed Sept. 7, 1999); *United States* v. *3814 NW Thurman Street*, 164 F.3d 1191, amended, 172 F.3d 689 (9th Cir. 1999); *Yskamp* v. *Drug Enforcement Admin.*, 163 F.3d 767 (3d Cir. 1998); and *United States* v. *Real Property Known*

---

[10] Petitioner also suggests that the Court's opinion in *Bennis* was joined by only four Justices (Pet. 15), but in fact five Justices joined the majority opinion, with Justices Thomas and Ginsburg also filing separate concurring opinions.

as 415 East Mitchell Avenue, 149 F.3d 472 (6th Cir. 1998).

Petitioner misconstrues this Court's Eighth Amendment holdings. In *Austin*, the Court held that the Eighth Amendment applies to an *in rem* forfeiture only when the forfeiture constitutes "punishment" in some sense. *Austin*, 509 U.S. at 610. In holding that civil forfeiture under 21 U.S.C. 881 of a mobile home and an auto body shop were subject to the limitations of the Eighth Amendment's Excessive Fines Clause, the *Austin* Court explained that the inclusion of an innocent owner defense in Section 881 reveals a "congressional intent to punish * * * those involved in drug trafficking." *Austin*, 509 U.S. at 619. The Court contrasted forfeitures under the narcotics statutes with "the forfeiture of goods involved in customs violations." *Id.* at 621. The latter are not considered to be punishment, but "a reasonable form of liquidated damages." *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 237 (1972).

In *Bajakajian*, the Court held that "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *Bajakajian*, 524 U.S. at 334. The Court had "little trouble concluding" that the forfeiture of currency under 18 U.S.C. 982(a)(1) "constitutes punishment." 524 U.S. at 328. The Court explained that the forfeiture in *Bajakajian* did "not bear any of the hallmarks of traditional civil *in rem* forfeitures":

> The Government has not proceeded against the currency itself, but has instead sought and obtained a criminal conviction of respondent personally. The forfeiture serves no remedial purpose, is designed to

> punish the offender, and cannot be imposed upon innocent owners.

Id. at 331-332.

As the court of appeals recognized (Pet. App. 19a), the present case is quite different from *Bajakajian*. First, this case, unlike *Bajakajian*, "was not part of a criminal prosecution." Pet. App. 18a. Second, this case involves the violation of "a customs law, traditionally viewed as non-punitive," in contrast to the criminal forfeiture provision at issue in *Bajakajian*. *Id.* at 19a. And third, the forfeiture in this case does serve an important remedial purpose, namely the return of a valuable artifact to its country of origin in accordance with foreign law. See *id.* at 5a. No interest in the forfeited item is to be retained by the United States.

Nor does this case conflict with the post-*Bajakajian* appellate forfeiture decisions cited by petitioner. See Pet. 23. Three of those cases, like *Austin*, involved narcotics-related forfeitures (two under 21 U.S.C. 881), and all three were upheld in the face of Eighth Amendment challenges. See *Wilton Manors*, 175 F.3d at 1310-1311 ("the forfeiture of a $70,000 property based on those crimes does not violate the Eighth Amendment"); *East Mitchell Avenue*, 149 F.3d at 478 ("no gross disproportion between the value of the property [forfeited] and the gravity of the offense," which "involved a sophisticated, on-going cultivation operation"); *Yskamp*, 163 F.3d at 773 (forfeiture of aircraft worth more than half a million dollars "was not excessive").

Thurman Street is the only court of appeals decision cited by petitioner in which the forfeiture was held to be an excessive fine, but that case involved an unusual situation in which no injury was "suffered by the government or any other party, as the fraudulently-

obtained loan will be fully repaid." *Thurman*, 164 F.3d at 1198. Here, the Republic of Italy was sufficiently harmed by the loss of a valuable antique artifact that it submitted a Letters Rogatory Request to the United States in an effort to remedy that harm. See Pet. App. 5a.[11] Moreover, as the district court explained, the violation here—making false statements so as to permit trafficking in cultural artifacts—is a serious one. *Id.* at 48a.

Finally, this case would not in any event be a good vehicle for addressing any Excessive Fines Clause issues. The lack of clarity in the record concerning the extent to which petitioner has already been compensated or is entitled to compensation for the forfeiture under the terms of the purchase agreements, see Pet. App. 4a, 47a; p. 2, *supra*, makes this case particularly unsuitable for balancing the amount of the forfeiture with the gravity of any underlying offense. See *Bajakajian*, 524 U.S. at 339-340.

---

[11] Petitioner also cites (Pet. 23) a District of Columbia Court of Appeals case, *One 1995 Toyota Pick-up Truck* v. *District of Columbia*, 718 A.2d 558 (D.C. 1998), in which that court held that the forfeiture of a truck valued at $15,500 was an excessive fine for a first offender's solicitation of prostitution, under an earlier version of a local statute that imposed a maximum fine of $300 for such a first offense. The facts of *One 1995 Toyota* and the statute at issue in that case are markedly different from the facts and statute involved in the present petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JAMES K. ROBINSON
Assistant Attorney General
DANIEL S. GOODMAN
Attorney

DECEMBER 1999

Supreme Court, U.S.
FILED
DEC 17 1999
CLERK

(3)

No. 99-641

IN THE

Supreme Court of the United States

MICHAEL H. STEINHARDT,

Petitioner,

v.

UNITED STATES OF AMERICA
and REPUBLIC OF ITALY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

FREDERICK P. SCHAFFER
Counsel of Record
SCHULTE ROTH & ZABEL LLP
Attorneys for Petitioner
900 Third Avenue
New York, New York 10022
(212) 756-2000

Of Counsel:

MICHAEL S. FELDBERG
DENNIS C. O'DONNELL

156836

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

908

TABLE OF AUTHORITIES

Page

CASES:

Bennis v. Michigan, 516 U.S. 442 (1996) 3

Kungys v. United States, 485 U.S. 759 (1988) 3

Neder v. United States, 119 S. Ct. 1827 (1999) ... 3

United States v. Bajakajian, 118 S. Ct. 2028 (1998) .. 1, 4, 5, 6

United States v. Corcuera-Valor, 910 F.2d 198 (5th Cir. 1990) 2

United States v. 817 N.E. 29th Drive, Wilton Manors, Florida, 175 F.2d 1304 (11th Cir. 1999), *petition for cert. filed* (Sept. 7, 1999) 5

United States v. Gaudin, 515 U.S. 506 (1995) 3

United States v. McClain, 545 F.2d 988 (5th Cir. 1977) 1

United States v. Real Property Known and Numbered As 415 East Mitchell Avenue, 149 F.3d 472 (6th Cir. 1998) 5

United States v. Rose, 570 F.2d 1358 (9th Cir. 1978) ... 2

United States v. Steinfels, 753 F.2d 3733 (5th Cir. 1985) 2

Cited Authorities

	Page
United States v. Teraoka, 669 F.2d 577 (9th Cir. 1982)	2
United States v. 3814 NW Thurman Street, Portland Oregon, 164 F.3d 1191 (9th Cir. 1999)	5
Yskamp v. DEA, 163 F.3d 767 (3d Cir. 1998)	5
CONSTITUTIONAL PROVISION:	
U.S. Const. amend. VIII	4, 6
STATUTES AND REGULATION:	
18 U.S.C. § 542	2
National Stolen Property Act, 18 U.S.C. § 2314, *et seq.*	1
19 C.F.R. § 12.80(b)(1)	2

Every argument in the brief in opposition is based on the assumption that the importation of the Phiale violated the National Stolen Property Act, 18 U.S.C. § 2314, *et seq.* ("NSPA"). However, the Court of Appeals did not reach that issue. Without a violation of the NSPA: (1) the United States had no power to seize the Phiale[1] even if Haber's customs broker had written on the customs entry form that the country of origin was Italy and the item was worth more than $1,000,000, and therefore under any standard of materiality, the Phiale was not imported "by means of" a false statement; (2) there is no question that petitioner is "wholly innocent" (Opp. Br. 16), and therefore entitled to due process protection with respect to the false statements on the customs entry form; and (3) the United States has no remedial purpose in returning the Phiale to Italy and therefore, under *United States v. Bajakajian,* 118 S. Ct. 2028 (1998), the forfeiture can only be punitive.

1. Unless the importation of the Phiale violated the NSPA, an issue the Second Circuit did not reach, there was no prohibition against its importation, regardless of whether or not the country of origin was Italy. The only legal authority relied on by the government and cited in the Customs Service Policy is the NSPA, as erroneously interpreted in *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977). Since the Second Circuit declined to decide whether that interpretation of *McClain* was correct or not, it is a bootstrap argument to rely on it as the basis for a claim of materiality. Without the *McClain* argument, there is no legal authority for the United States to seize the Phiale regardless of what was written on the form. Accordingly, the false statements could not be material under any standard.

1. Unless otherwise indicated, capitalized terms have the same meaning in this Reply as the same terms had in the Petition.

The government contends that the proper standard of materiality is whether or not the statement "has the potential significantly to affect the importation process or Customs Service operations (such as where it might reasonably prevent Customs from imposing an otherwise appropriate duty on the item), even if it could not affect whether or not the item would actually be admitted into the country." (Opp. Br. 11 (fn. omitted)). In this case, however, it is undisputed that there is no duty on art work. Accordingly, even under the government's preferred standard, the misstatement as to the country of origin was not material.[2]

Moreover, to reach its preferred standard, the government relies on cases interpreting the materiality

2. The government also argues incorrectly that the conflict between the Second Circuit's decision in this case and decisions by the Fifth and Ninth Circuits in *United States v. Corcuera-Valor*, 910 F.2d 198 (5th Cir. 1990), and *United States v. Teraoka*, 669 F.2d 577 (9th Cir. 1982), is not a "true conflict" because of "earlier decisions" by those circuits on similar issues. (Opp. Br. 11.) Contrary to the government's assertions, however, neither of the earlier cases cited rejected a "but for" causation standard. Indeed, the Fifth Circuit's decision in *United States v. Steinfels*, 753 F.2d 3733 (5th Cir. 1985) specifically endorsed such a standard by holding that false statements relating to pollution control standards (as opposed to the statements relating to an exemption from duties pointed to by the government) were material because, without such statements, the automobiles at issue would have been denied entry. *Id.* at 377 (plaintiff "concedes that the automobiles would not have been released from Customs" if the DOT and EPA forms had not been falsely executed); *see* 19 C.F.R. § 12.80(b)(1). The Ninth Circuit's decision in *United States v. Rose*, 570 F.2d 1358 (9th Cir. 1978) is not to the contrary, holding simply that Section 542's "by means of language" requires a showing of materiality — a holding subsequently refined to include a "but for" analysis in the Court of Appeals' later *Teraoka* decision.

standard in statutes that do not contain the "by means of" requirement. (Opp. Br. 8 (citing *Neder v. United States*, 119 S. Ct. 1827, 1837 (1999); *United States v. Gaudin*, 515 U.S. 506, 509 (1995); *Kungys v. United States*, 485 U.S. 759, 770 (1988).) The government also minimizes the significance of the statutory language by arguing that the phrase "by means of" connotes only instrumentality, and not "but for" causation. (Opp. Br. 13.) By the government's standard, *any* false statement contained in a document submitted in connection with the importation of an object would satisfy the "by means of" requirement. (*Id.*) The flaw in that argument is that it renders the "by means of" requirement meaningless.[3]

2. The government's argument on due process makes two points. *First*, the government argues that petitioner may be entitled to recover his losses from the sellers based on the "Terms of Sale" document. (Opp. Br. 16.) It is undisputed, however, that petitioner is not a party to that document and was not even aware of it until discovery in this case. In any event, the due process rights of an innocent owner in connection with the forfeiture of his property cannot depend upon the possibility that he may have a remedy against the actual wrongdoers. Certainly none of the opinions in *Bennis* deemed it relevant whether Mrs. Bennis could sue her husband for her share of the value of the forfeited car. *See Bennis v. Michigan*, 516 U.S. 442 (1996).

---

3. The government's dictionary definition of "by means of" does not further its argument. For an item to be imported "through the agency or instrumentality of" a false statement, it must be the case that in the absence of a false statement, the item could not have been imported. That is not the case here.

Second, the government cites to language in the district court opinion that the extent of petitioner's culpability is "unclear". (App. 48a.) However, the district court made that observation in connection with the NSPA issue, which the Second Circuit did not reach. It is undisputed that petitioner had nothing whatsoever to do with the statements contained in the customs entry forms.

3. The government's effort to distinguish *Bajakajian* is unavailing. *Bajakajian* held that where the only loss to the government is information, a forfeiture cannot be remedial, and is therefore necessarily punitive within the meaning of the Eighth Amendment. 118 S. Ct. at 2034. That is the case here.

The government argues that forfeiture here "does serve an important remedial purpose, namely the return of a valuable artifact to its country of origin in accordance with foreign law." (Opp. Br. 18.) That argument begs the question, because in the absence of a violation of the NSPA, the United States has no valid or legitimate interest in returning the Phiale to Italy.

In any event, the question of whether a statute has a remedial purpose cannot depend on the particular use to which the government, at its discretion, plans to put the forfeited property. After all, the result in *Bajakajian* would not have been different if the government had chosen to donate the Bajakajians' cash to the American Red Cross. Where, as here, the only harm to the United States is the loss of information, *Bajakajian* holds that the statute does not serve any general remedial purpose of the United States and forfeiture thereunder is necessarily punitive. 118 S. Ct. at 2034.

The government also seeks to distinguish this case from *Bajakajian* on the ground that *Bajakajian* involved a criminal forfeiture and this case involves an *in rem* forfeiture. (Opp. Br. 17-18.) However, four post-*Bajakajian* court of appeals decisions addressing the issue have applied the *Bajakajian* analysis in holding that the *in rem* forfeiture statutes involved are punitive.[4]

It is true, as the government argues, that in three of those four cases the court of appeals went on to hold that the forfeiture did not constitute an excessive fine. The Court of Appeals in this case held that the forfeiture was not punitive and therefore did not reach the question of whether it was excessive. However, the facts of this case present an even more compelling case for excessiveness than *Bajakajian*. Here, petitioner is wholly innocent of the wrongdoing that is the basis for the forfeiture. Moreover, the only harm to the United States, as in *Bajakajian*, is the loss of information which, as in *Bajakajian*, is excessive compared to the loss of an object worth over $1,000,000. Any harm suffered by the Republic of Italy is irrelevant, especially without a finding of a violation of the NSPA.

Contrary to the government's argument, this case is an excellent vehicle to address the fundamental issue of whether the *Bajakajian* analysis applies to an *in rem* forfeiture case. The issue is purely one of law, and the decision below that

---

4. *Yskamp v. DEA*, 163 F.3d 767 (3d Cir. 1998); *United States v. Real Property Known and Numbered As 415 East Mitchell Avenue*, 149 F.3d 472, 476-77 (6th Cir. 1998); *United States v. 3814 NW Thurman Street, Portland Oregon*, 164 F.3d 1191 (9th Cir. 1999); *United States v. 817 N.E. 29th Drive, Wilton Manors, Florida*, 175 F.2d 1304 (11th Cir. 1999).

the forfeiture was not punitive conflicts with post-*Bajakajian* decisions in four other circuits.[5]

CONCLUSION

For all the foregoing reasons, as well as those set forth in the Petition, petitioner Michael H. Steinhardt's petition for writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

FREDERICK P. SCHAFFER
Counsel of Record
SCHULTE ROTH & ZABEL LLP
Attorneys for Petitioner
900 Third Avenue
New York, New York 10022
(212) 756-2000

Of Counsel:

Michael S. Feldberg
Dennis C. O'Donnell

---

5. The government is not helped by its argument that "[t]he lack of clarity in the record concerning the extent to which petitioner has already been compensated or is entitled to compensation for the forfeiture" makes this case "particularly unsuitable for balancing the amount of the forfeiture with the gravity of any underlying offense." (Br. in Opp. 19). Even if that fact were relevant to the Eighth Amendment analysis, which we dispute, the remedy for a lack of clarity in the record is to remand, not to affirm a grant of summary judgment.